Supreme Court, U.S.
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No.

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In The

# Supreme Court of the United States

October Term, 1996

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**DAVID GOODHART and HARVEY SHENBERG,**

*Petitioners,*

**v.**

**UNITED STATES OF AMERICA,**

*Respondent.*

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**ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT**

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## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED FOR REVIEW

### I.

WHETHER THE COURT SHOULD RESOLVE THE SPLIT IN THE CIRCUITS CONCERNING THE DEGREE OF UNANIMITY REQUIRED BY THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT AND THE JURY TRIAL CLAUSE OF THE SIXTH AMENDMENT IN COMPOUND-COMPLEX CRIMES, SUCH AS RICO CONSPIRACY?

### II.

WHETHER THE COURT SHOULD RESOLVE THE SPLIT IN THE CIRCUITS CONCERNING THE FUNDAMENTAL NATURE OF THE "AGREEMENT" PROHIBITED BY RICO CONSPIRACY BY REQUIRING PROOF THAT EACH CONSPIRATOR AGREE TO PERSONALLY COMMIT AT LEAST TWO RACKETEERING ACTS?

## LIST OF PARTIES

Pursuant to Supreme Court Rule 14.1(b), the following is a list of all parties to the proceedings:

Dennis R. Bedard
Harry Boehme
Stephen J. Bronis
Edward Carhart
William Castro
Phillip S. Davis
Vincent Flynn
Roy Gelber
Jose A. Gonzalez, Jr.
David Goodhart
Alcee Hastings
James Jay Hogan
Gerald Hoolihan
Michael Hursey
Lawrence D. LaVecchio
Nancy Lechtner
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Richard Marx
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Alfonso Sepe
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Susan Van Dusen
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## OPINION BELOW

The July 12, 1996, opinion of the United States Court of Appeals for the Eleventh Circuit is reported at *United States v. Shenberg*, 89 F.3d 1461 (11th Cir. 1996). A copy of *Shenberg* is attached hereto as **APPENDIX A.**

## JURISDICTION

The opinion of the Eleventh Circuit in *Shenberg* was filed on July 12, 1996. The Eleventh Circuit denied rehearing on September 25, 1996. *See* **APPENDIX B.** This petition for a writ of certiorari follows within 90 days of the latter date. *See* Supreme Court Rule 13. The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment provides, in pertinent part: "No person shall be ... deprived of life, liberty, or property, without due process of law...." U.S. CONST., AMEND. V.

The Sixth Amendment provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed...." U.S. CONST., AMEND. VI.

## STATEMENT OF THE CASE

### A. Procedural History

On September 24, 1991, the government charged Petitioners David Goodhart and Harvey Shenberg and others with conspiring to violate and with violating the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961 *et seq.*, and related counts of extortion. (R1-1.) Count 1, the RICO conspiracy count, alleged that Petitioners "agreed to conduct and participate in the affairs of the enterprise." Count 1 defined the RICO "agreement" as only requiring proof that Petitioners agreed that 2 of the 13 listed racketeering acts would be committed by *someone*. Count 1 failed to allege that Petitioners agreed to *personally* commit at least two such acts. Petitioners moved to dismiss Count 1 for failure to state an offense, relying on the law of several federal circuits which have adopted a "personal commission" rule for RICO conspiracy. *See* Section II *infra*. (R8-327-29.) The court denied the motion to dismiss, because the Eleventh Circuit had already cast its vote with the side of the split allowing a vicarious definition of the agreement prohibited by RICO conspiracy.

Goodhart and Shenberg went to trial between September 21, 1992 and April 26, 1993. During the charge conference, Petitioners submitted special unanimous verdict instructions on the RICO counts. As noted above, the RICO counts alleged the existence of 13 "racketeering acts." (*See* R1-1-25-46.) However, none of these acts were pleaded in terminology

meeting the statutory definition of "racketeering activity" under 18 U.S.C. § 1961(1).[1] Rather, the acts were pleaded as subtitles. For example, Racketeering Act No. 10 was pleaded merely as the "Act of Racketeering Involving Receipt of $150,000 Payment To Influence the 'Boni Carrillo Case.'" (R1-1-40.) To satisfy Section 1961(1), and to give the jury as many options to convict as possible, the 13 generic racketeering acts were divided into numerous "sub" acts. Each such "sub" act was pleaded as a violation of a specific state or federal offense within the meaning of Section 1961(1). Thus, again using Racketeering Act No. 10 as an example, the "Boni Carrillo" racketeering act was subdivided into 6 "sub" acts: (a) attempted extortion (18 U.S.C. § 1951); (b) bribery (Florida Statute, § 838.015); (c) unlawful compensation (Florida Statute, § 838.016(1); and (d)-(f) money laundering (18 U.S.C. § 1956).

Petitioners requested that the jurors be instructed that they had to be unanimous, not only as to the generically worded "racketeering acts" but also as to the "sub" acts, the actual crimes being considered by the jury. (R15-715; **APPENDIX A.**) While the district court agreed to do so as to the *substantive* RICO charge in Count 2, it refused to require juror unanimity

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[1] Section 1961(1) defines "racketeering activity," in pertinent part, as either "(A) any act or threat involving murder ... bribery ... which is chargeable under State law" or "(B) any act which is indictable under any of the following provisions of Title 18, United States Code: ... section 1951 (relating to interference with commerce, robbery, or extortion)...."

on the "sub" acts on the RICO *conspiracy* charge in Count 1 and, similarly, refused to use a special verdict on Count 1. (R132-11,966; R18-895-3.)

In addition, with respect to the RICO conspiracy charge, Goodhart and Shenberg requested that the jury be instructed on the fundamental nature of the "agreement," *i.e.*, whether the jury believed Goodhart and Shenberg *personally* agreed to commit the acts or whether the jury believed he agreed that *others* would commit the acts. (R132-11,966.) The court, however, ruled that personal agreement was not required and denied the requested instructions.

The jury commenced its deliberations on Thursday, March 11, 1993. Confused over the meaning of RICO conspiracy, the jury sent the court two notes expressing further instruction. In particular, the jury wished to know: "As to Count 1 ... are we to determine if the defendant allegedly committed each numbered predicate offense, or conspired to commit each predicate offense?" (Emphasis in original.) Before notifying counsel of the note, the court drafted a proposed response which read, in pertinent part:

> As to the third element of Count 1, what you must find beyond a reasonable double is that the defendant, knowingly and willfully agreed to join the conspiracy with the specific intent to either:
>
> (a) personally participate in the commission of two "predicate offenses"; *or*

> *(b) with the knowledge and intent that other members of the conspiracy would commit two or more "predicate offenses"* as part of a pattern of "racketeering activity."

(Emphasis added.)

Petitioners objected to the italicized portion of the court's proposal on the grounds that it mis-defined RICO conspiracy. Petitioners also renewed their request for special unanimous verdict instructions. In particular, they requested that the jurors be instructed that they had to be unanimous as to (1) the racketeering acts, (2) the sub-racketeering acts and (3) the type of agreement -- whether the petitioners *personally* agreed to commit the acts or whether they agreed that the acts *would be committed by others*. (R18-895-3.) The court again denied Petitioners' unanimous verdict requests and proposed the following response to the jury's question:

> As page 1 of Instruction No. 9 points out, the Defendants named in Count I of the indictment -- the conspiracy count -- are not charged in that count with violating Title 18, U.S. Code, Section 1962(c)(Count 2); rather they are charged in Count I with having knowingly and willfully conspired to violate that law.
>
> I know it is confusing. I have tried to make the law applicable to Count I as clear as possible within the limitations imposed by the language of the statute, Title 18, U.S. Code, Section 1962(c) and (d).

> The statute as enacted by Congress describes the crime, lists the elements, and defines the elements of the offenses.
>
> The instruction as given you must be based upon the language of the statute. I cannot clarify it further since I am powerless to amend the statute; only Congress can enact or amend laws.
>
> I regret that I cannot be more helpful and I certainly understand and appreciate your situation. I can only suggest you again review Instruction No. 9 in conjunction with all of the other instructions.

(Emphasis in original.)

Based upon objections from the government to the court's apologetic remarks, the court agreed to strike the phrases "I know it is confusing" and "I certainly understand and appreciate your situation" (although the court noted that "that's the truth"). Transcript, March 29, 1993, at 81. The court then issued the instruction.

The jury deliberated more than a month before reaching a verdict on April 26, 1993. (R18-918.) Neither Goodhart nor Shenberg was found guilty of the substantive RICO charge in Count 2. Accordingly, the special verdict form was left entirely blank. However, Goodhart and Shenberg were convicted of Count 1, RICO conspiracy -- the one count the jury could not understand and for which no special unanimous verdict instruction was given and no special verdict was required. Shenberg was also convicted of one additional count, an extortion charge

in Count 90. The jury either acquitted Petitioners or was unable to reach a verdict as to the remaining counts levied against them. Therefore, the manner in which the jury convicted Petitioners of RICO conspiracy could not be divined from an examination of the verdict as a whole.

Goodhart and Shenberg both received lengthy prison terms on their RICO conspiracy convictions. (R21-1008, 1011, 1018.) They subsequently appealed their convictions to the United States Court of Appeals for the Eleventh Circuit.

## B. Statement of the Facts

For purposes of this Petition only, Goodhart and Shenberg adopt the "Fact" section of the Eleventh Circuit's decision in *United States v. Shenberg*, 89 F.3d 1461 (11th Cir. 1996). *See* **APPENDIX A.**

## C. The Eleventh Circuit's Decision

On appeal, Goodhart and Shenberg argued that the district court violated their Fifth and Sixth Amendment rights by refusing to require juror unanimity on the predicate crimes at issue in the RICO conspiracy charge and by allowing that charge to be based upon a defective definition of the RICO "agreement." They then argued that the court compounded this error by also refusing to require a special verdict for any aspect of the RICO conspiracy charge.

On July 12, 1996, the Eleventh Circuit affirmed Petitioners' convictions. The court held that the unanimous verdict instruction given -- as to the generic "racketeering acts" -- was accurate and "presum[ably]" followed by the jury. *Shenberg*, 89 F.3d at 1372. The court never once acknowledged: (1) that the "racketeering acts" were mere subtitles and that the crimes at issue were pleaded *only* in the "sub" acts; and (2) that the district court had *refused* to require juror unanimity as to those acts and the nature of the RICO agreement itself.

Petitioners sought rehearing and rehearing *en banc*, which was denied on September 25, 1996, and the Eleventh Circuit entered its judgment against them on October 17, 1996.

## REASONS FOR GRANTING THE WRIT

### I. THE COURT SHOULD GRANT THE PETITION TO RESOLVE THE CONFLICT AMONG THE CIRCUITS CONCERNING JURY UNANIMITY AND VERDICT SPECIFICITY IN COMPOUND-COMPLEX CRIMES.

### A. Introduction

Over the last 25 years, Congress has enacted a series of compound-complex criminal statutes, including RICO, the Continuing Criminal Enterprise ("CCE") statute (21 U.S.C. § 848), the Gambling Business statute (18 U.S.C. § 1955) and the Continuing Financial Crimes Enterprise ("CFCE") statute (18 U.S.C. § 225). These statutes fundamentally differ from traditional criminal offenses in that they proscribe the participation in a "pattern" or "series" of criminal conduct. The "pattern" or "series," in turn, consists of a specific, minimum number of violations of *other* criminal statutes. These violations are commonly termed "predicate offenses" or "predicate acts."

For example, to establish a substantive violation of RICO, 18 U.S.C. § 1962(a)-(c), the government must prove that a defendant engaged in a "pattern" of racketeering activity," which, in turn, requires proof of "at least two acts of racketeering activity." 18 U.S.C. § 1961(5). Similarly, to establish a violation of RICO conspiracy, 18 U.S.C. § 1962(d), the government must prove that the conspirators agreed to the commission of two or more predicate acts. *United States v.*

*Neapolitan*, 791 F.2d 489, 499 (7th Cir.), *cert. denied*, 479 U.S. 940, 107 S.Ct. 422, 93 L.Ed.2d 372 (1986); *United States v. Carter*, 721 F.2d 1514 (11th Cir.), *cert. denied*, 469 U.S. 819 (1984); *United States v. Martino*, 648 F.2d 367, 396 (5th Cir. 1981).

The CCE statute, like RICO conspiracy, is an inchoate, conspiracy-type offense. *See Rutledge v. United States*, ___ U.S. ___, 116 S.Ct. 1241, 134 L.Ed.2d 419 (1996). To prove a CCE charge, the government must establish, among other elements, the existence of a "continuing series" of narcotics violations. 21 U.S.C. § 848(a). Most federal courts of appeal have defined the "continuing series" element as requiring proof of at least three Title 21 offenses. *See, e.g., United States v. Young*, 745 F.2d 733, 747 (2d Cir. 1984) (collecting cases), *cert. denied sub nom. Myres v. United States*, 470 U.S. 1084, 105 S.Ct. 1842, 85 L.E.2d 142 (1985). *See also* 18 U.S.C. § 225(b) (prohibiting the commission of a "series of violations" of enumerated federal financial crimes).

The compound nature of the proof necessary to convict under compound-complex criminal statutes raises serious questions of jury unanimity and verdict specificity. In particular, must a jury agree unanimously on the identity of the two or three predicate acts that constitute the "pattern" or "continuing series" agreed upon by the defendant or must a jury be unanimous only in the overall conclusion that the defendant agreed to commit at least two or three such acts?

For example, in order to prove the "pattern" element for RICO and RICO conspiracy, the government may present evidence of four federal and state crimes, labeled A, B, C and D, respectively. Six jurors may be convinced beyond a reasonable doubt that the defendant committed acts A and B, while the other six juror may be convinced that he committed acts C and D. If jurors are permitted to reach a general verdict on the "pattern" element, they will vote to convict because each of the twelve jurors is convinced that the defendant committed or agreed to commit two predicate acts.

The problem created by the sheer numerosity of the predicate acts was exacerbated by the approach the government took to prosecute the instant case. Because the government was not required to convince the jury that Petitioners committed or agreed to commit *all* the predicate acts charged, the government engaged in a scattershot approach. The government charged as many predicate acts as possible (13 in total), with the hope of convincing a jury that Petitioners committed or agreed to commit the requisite minimum number (2). As the number of possible predicate offenses increased, so did the number of combinations of offenses justifying a conviction.

One commentator has calculated that the number of different combinations of eligible predicate acts is represented by the equation: n!/(n-k)!k! Where "n" equals the number of predicates charged and "k" equals the number of predicates needed to constitute the series or pattern. This equation is termed the binomial coefficient for k out of n. *See* Miller,

*Compound-Complex Criminal Statutes and the Constitution: Demanding Unanimity as to Predicate Acts*, 104 YALE L.J. 2277, 2283 & n. 30 (1995).

In the instant case, there were 13 potential predicate acts ("n") and the government only needed to convince the jury that Petitioners agreed to commit 2 of them ("k"). This presented the jury with 78 different combinations of the requisite "pattern" element. The number of potential combinations actually increased exponentially in this case by the government's use of "sub" predicate acts -- the breaking down each of the original 13 predicate acts into multiple offenses. Since the jurors were not told that they had to agree unanimously on exactly which crimes supported which acts, it was possible, if not probable, that each juror based his or her guilty verdict on RICO conspiracy upon a different conception of the "pattern."

In addition to the sheer number of predicate and "sub" predicate acts presented to the jury, the variety of crimes eligible as predicates was astounding. RICO predicates potentially encompass nine major categories of state crimes and 35 different federal offenses. 18 U.S.C. § 1961(1). Moreover, the permissible federal crimes include crimes which, themselves, are compound offenses. In Racketeering Act No. 10, for example, the jury was allowed to choose between the federal crimes of money laundering and extortion, as well as the state crimes of bribery and unlawful compensation. Such a broad range of crimes created a possible scenario in which jurors

voting to convict had widely disparate views as to both the type and severity of the "pattern" in which Petitioners engaged.

### B. The Circuit Split

The circuit courts directly conflict over the level of unanimity required in compound-complex crimes. On the one hand, the Third Circuit has determined that predicate acts are principal elements of the offense, requiring unanimity. *See United States v. Edmonds*, 52 F.3d 1236 (3d Cir. 1995), *aff'd* 80 F.3d 810 (3d Cir. 1996) (en banc) (error to deny a unanimous verdict instruction as to the predicate crimes which constituted the CCE "series" of violations), *cert. denied*, 1996 U.S. LEXIS 65143 (U.S. 1996). *Accord United States v. Echeverri*, 854 F.2d 638 (3d Cir. 1988); *United States v. Beros*, 833 F.3d 255 (3d Cir. 1987). *Cf. United States v. Hernandez-Escarsega*, 886 F.2d 1560, 1573 (9th Cir. 1989) (noting that "it would have been the better practice to give a specific unanimity instruction" but finding any error harmless). Other courts have reached similar results when construing the unanimity requirements of other types of multiple-object offenses. *See, e.g., United States v. Puerta*, 38 F.3d 34 (1st Cir. 1994) (reversing bank fraud conviction where district court failed to require jury unanimity as to methods of committing the crime); *United States v. Correa-Ventura*, 6 F.3d 1070, 1081 (5th Cir. 1993) ("the jury should not be permitted to

evaluate separate and distinct offenses about which they may disagree in rendering a patchwork guilty verdict").[2]

On the other hand, the Fourth, Seventh and D.C. Circuits have expressly disagreed with the Third Circuit's reasoning, holding that predicate acts are mere means of fulfilling the CCE "series" element and, therefore, juries need not agree on the same predicate acts. *See United States v. Hall*, 93 F.3d 126 (4th Cir. 1996) (as long as each juror is satisfied in his or her own mind that the defendant committed acts constituting the [continuing] series, the requisite jury unanimity exists" for a CCE conviction); *United States v. Anderson*, 39 F.3d 331, 350-51 (D.C. Cir. 1994) ("[t]hat one juror may find one group of predicate offenses, while another may find a different, if overlapping, group seems of little moment"); *United States v. Canino*, 949 F.2d 928, 947-48 (7th Cir. 1991) ("[w]e do not require that the jurors unanimously agree as to the same predicate acts"), *cert. denied*, 504 U.S. 910, 112 S.Ct. 1940, 118 L.Ed.2d 546 (1992).[3]

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[2] *See also United States v. Holley*, 942 F.2d 916, 928-29 (5th Cir. 1991), *cert. denied*, 510 U.S. 821, 114 S.Ct. 77, 126 L.Ed.2d 45 (1993); *United States v. Duncan*, 850 F.2d 1104 (6th Cir. 1988), *aff'd without op. on appeal after remand*, 881 F.2d 1077 (6th Cir. 1989), *cert. denied sub nom. Downing v. United States*, 493 U.S. 1025, 110 S.Ct. 732, 107 L.Ed.2d 751 (1990).

[3] The D.C. Circuit's opinion in *Anderson* arguably conflicts with its prior opinion in *United States v. North*, 910 F.2d 843, 874-878 (D.C. Cir. 1990) (reversing conviction, in part, because

(continued...)

The Eleventh Circuit's position, as espoused in the instant case, appears to fall somewhere in between these two camps. The Eleventh Circuit held that the district court "properly" required the jury to be unanimous as to the "racketeering acts." *Shenberg*, 89 F.3d at 1472. However, the Eleventh Circuit affirmed the district court's refusal to extend the unanimity requirement to RICO conspiracy and its "sub" acts -- which, in this case, were the actual crimes the jury had to determine the Petitioners agreed to commit.

### C. The Meaning of Schad

The split in the Circuits is due, in part, to the interpretative difficulties caused by *Schad v. Arizona*, 501 U.S. 624, 111 S.Ct. 2491, 115 L.Ed.2d 555 (1991). In that case, a four-Justice plurality concluded that when a statute enumerates alternative methods for its violation, whether jurors must be unanimous with respect to a particular method depends on two questions. *First*, did the legislature *intend* the different methods to establish separate "offenses" for which unanimity is required or different means of violating a single offense for which unanimity is not required? *Second*, if the legislature intended the alternative methods to be mere means of violating a single statute, is the statute's definition of the crime unconstitutional

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[3](...continued)
district court refused to require juror unanimity on three alternative theories -- whether the defendant destroyed, altered or removed documents in violation of 18 U.S.C. § 2071), *cert. denied*, 500 U.S. 941, 111 S.Ct. 2235, 114 L.Ed.2d 477 (1991).

under the Due Process Clause of the Fifth Amendment? *Schad*, 501 U.S. at 631-33, 111 S.Ct. at 2496-97.

The Court in *Shad* applied this test to uphold a conviction under Arizona's first degree murder statute. The statute permitted a conviction under two alternative theories -- the premeditated killing of another and felony murder. In ruling that a general verdict was constitutionally permissible, the plurality answered the first question concerning legislative intent by deferring to Arizona's interpretation of its own murder statute. *Id.* at 636-37, 111 S.Ct. at 2499. In answering the second, more fundamental constitutional question, the plurality declined the opportunity to construct a single due process test for the level of definitional and verdict specificity.[4] Instead, the plurality set forth a loosely defined test that looked to "history and wide practice ... as well as to the narrower analytical methods of testing the moral and practical equivalence" of alternative means of satisfying a principal factual element of an offense. *Id.* at 637, 111 S.Ct. at 2500. Since murder statutes, such as Arizona's, had a long history and widespread use, the plurality upheld the statute. Justice Scalia, providing the key fifth vote in his concurring opinion, agreed with the plurality in *Schad only* because first degree murder,

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[4] The Court expressly declined to adopt the "distinct conceptual groupings" test first articulated by the Fifth Circuit in *United States v. Gipson*, 553 F.2d 453 (5th Cir. 1977), and subsequently followed by numerous courts. *See Schad*, 501 U.S. at 634-35, 111 S.Ct. at 2498 (citations omitted).

based on alternative mental states, was permitted at common law and "was the norm when this country was founded." *Id.* at 651, 111 S.Ct. at 2507 (Scalia, J., concurring).

The reasoning employed by the plurality in *Shad* compels quite a different result when applied to compound-complex crimes. The plurality defined the due process "problem" as one of "describing the point at which differences between means become so important that they may not reasonably be viewed as alternatives to a common end, but must be treated as differentiating what the Constitution requires to be treated as separate offenses." *Schad*, 501 U.S. at 633, 111 S.Ct. at 2498. Although the "problem" was deemed too diverse to adopt a more defined test, the four-Justice plurality expressly noted that "nothing in our history suggests that the Due Process Clause would permit a State to convict anyone under a charge of 'Crime' so generic that any combination of jury findings of embezzlement, reckless driving, murder, burglary, tax evasion, or littering, for example, would suffice for conviction." *Shad*, 501 U.S. at 633, 111 S.Ct. at 2497. Of course, RICO -- with its multiple and diverse predicate act requirement -- is just such a "generic" crime.

Justice Scalia agreed with the plurality's disdain for overly "generic" crimes, stating that "one can conceive of novel 'umbrella' crimes (a felony consisting of either robbery or failure to file a tax return) where permitting a 6-to-6 verdict would seem contrary to due process." *Id.* at 650, 111 S.Ct. at 2506. RICO does just that. It is nothing if not a "novel

'umbrella' crime" which, absent a special unanimous verdict instruction, invites the jury to reach disparate conclusions as to the very nature of the "crime".

The predicate acts of RICO and other compound-complex crimes, thus, are not "reasonably ... viewed as alternatives to a common end" but are required by the Constitution "to be treated as separate offenses." *Schad*, 501 U.S. at 633, 111 S.Ct. at 2498. Indeed, they are *defined* as separate offenses in 18 U.S.C. § 1961(1)(B) (defining "racketeering activity" as any act "which is indictable" under listed federal statutes).

Moreover, unlike the murder statute at issue in *Schad*, the predicate-act requirement of RICO has no historical analogue. In fact, if RICO has a historical analogue it is in the broadly defined common law crimes that courts have declared unconstitutionally vague. *See, e.g., State v. Palendrano*, 293 A.2d 747 (N.J. Super. Ct. Law Div. 1972) (declaring unconstitutionally vague the common law crime of being a "common scold" -- which could consist of brawling, wrangling, breaking the public peace, increasing discord and/or being a nuisance).[5]

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[5] In fact, similar to committing a compound-complex crime such as RICO, being a common scold "does not consist of a single act, but in an habitual course of conduct; therefore, the element of continuity is essential, and there must be a habit or practice of scolding." *Palendrano*, 293 A.2d at 748. Similarly, RICO requires "continuity." *See Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 105 S.Ct. 3275, 87 L.Ed.2d 346 (1985).

In light of the confusion among the federal courts concerning the need for jury unanimity for compound-complex statutes, the issue is ripe for re-examination:

> The split in the circuits over the status of CCE predicates makes the question even more pressing.... [T]he current confusion surrounding the status of predicate acts demands insightful due process analysis.

Miller, *Compound-Complex Criminal Statutes and the Constitution: Demanding Unanimity as to Predicate Acts*, 104 YALE L.J. 2277, 2301 (1995). *See also Edmonds*, 80 F.3d at 818, n. 10 ("[h]opefully, the Supreme Court will revisit this question soon").

## II. THE COURT SHOULD GRANT THE PETITION TO RESOLVE THE CONFLICT AMONG THE CIRCUITS CONCERNING THE DEFINITION OF RICO CONSPIRACY.

Throughout this case, Goodhart and Shenberg preserved an objection to the Eleventh Circuit's definition of RICO conspiracy under 18 U.S.C. § 1962(d). Courts have agreed that the object of a RICO conspiracy is to violate a substantive RICO provision and "not merely to commit each of the predicate crimes necessary to demonstrate a pattern of racketeering activity." *United States v. Elliott*, 571 F.2d 880, 902 (5th Cir. 1978), *cert. denied*, 439 U.S. 953, 99 S.Ct. 349, 58 L.Ed.2d 344 (1978). However, due to the complicated nature of the RICO substantive provision, the federal courts have long been split concerning the fundamental nature of the "agreement" necessary to a RICO conspiracy charge.

Courts agree that the government must prove that a defendant charged with RICO conspiracy agreed to "conduct and participate" in the affairs of an enterprise through a "pattern" of racketeering activity or predicate acts. The nature of this "agreement," however, has caused a rift in the courts. The better reasoned courts, including the First, Second and Tenth Circuits, hold that in agreeing to "conduct" or "participate" in racketeering activity, each RICO conspirator must agree to *personally* commit two or more predicate acts. *See United States v. Sanders*, 929 F.2d 1466, 1473 (10th Cir. 1991) ("we adopt the rule of law that the defendant must agree to personally commit two predicate acts, not merely agree to

the commission of two predicate offenses by a conspirator"); *United States v. Teitler*, 802 F.2d 606, 613 (2d Cir. 1986) (trial court "properly required the jury to determine whether the defendant *agreed* to *commit* two predicate acts"; emphasis in original); *United States v. Ruggiero*, 726 F.2d 913, 921 (2d Cir.) ("for the government to convict on a RICO conspiracy it must prove that defendant himself at least agreed to commit two predicate crimes"), *cert. denied*, 469 U.S. 831, 105 S.Ct. 118, 83 L.Ed.2d 60 (1984); *United States v. Winter*, 663 F.2d 1120, 1136 (1st Cir. 1981) ("[a] RICO conspiracy count must charge at a minimum that each defendant agreed to commit two or more specified predicate crimes in addition to charging an agreement to participate in the conduct of an 'enterprise's' affairs through a pattern of racketeering activity"), *cert. denied*, 460 U.S. 1011, 103 S.Ct. 1249, 75 L.Ed.2d 479 (1983); *Friedman v. Arizona World Nurseries LP*, 730 F.Supp. 521 (S.D.N.Y. 1990) (defendant must have personally agreed to commit two or more predicate acts; "[i]t is not enough to agree that the crimes should be committed by others"), *aff'd without opinion*, 927 F.2d 594 (2d Cir. 1991).

Seven circuits, the Third, Fourth, Fifth, Sixth, Seventh, Eighth and Ninth Circuits, hold that a defendant need *not* personally agree to commit the two racketeering acts in order to be convicted of RICO conspiracy. Rather, these courts hold that it is enough that each conspirator merely agree that two racketeering acts would be committed by *someone*. *See United States v. Marmolejo*, 89 F.3d 1185, 1196 (5th Cir. 1996); *United*

*States v. Pryba*, 900 F.2d 748 (4th Cir.), *cert. denied*, 498 U.S. 924, 111 S.Ct. 305, 112 L.Ed.2d 258 (1990); *United States v. Kragness*, 830 F.2d 842, 860 (8th Cir. 1988); *United States v. Neapolitan*, 791 F.2d 489, 495-96 (7th Cir.), *cert. denied*, 479 U.S. 939, 107 S.Ct. 422, 93 L.Ed.2d 372 (1986); *United States v. Joseph*, 781 F.2d 549, 554 (6th Cir. 1986); *United States v. Adams*, 759 F.2d 1099, 1116 (3d Cir.), *cert. denied*, 474 U.S. 971, 106 S.Ct. 336, 88 L.Ed.2d 321 (1985); *United States v. Tille*, 729 F.2d 615, 619 (9th Cir.), *cert. denied*, 469 U.S. 845, 105 S.Ct. 156, 83 L.Ed.2d 93 (1984).

The Eleventh Circuit has further complicated this split. In *United States v. Carter*, 721 F.2d 1514 (11th Cir.), *cert. denied*, 469 U.S. 819 (1984), the Eleventh Circuit identified two types of RICO conspiracies: (1) a "single objective" conspiracy where the "pattern" element is met "[o]nly by demonstrating that the defendant agreed to personally commit two or more predicate acts"; and (2) an agreement to violate the substantive RICO provision itself. *Carter*, 721 F.2d at 1529-31 (citations omitted). In proving the second type of RICO conspiracy, according to the Eleventh Circuit, the government does not have to prove that the defendants personally agreed to commit two racketeering acts so long as they agreed "that two predicate acts [would] be committed" by someone. *Carter*, 721 F.2d at 1528. *See also United States v. Martino*, 648 F.2d 367, 396 (5th Cir. 1981) ("[i]n effect there are two agreements contained in a RICO conspiracy charge: an agreement to participate and an agreement to commit at least two proscribed acts ... [a]bsent a charge and

proof of an agreement to commit two of the specified predicate crimes, a defendant cannot be convicted of conspiring to participate in the affairs of an enterprise through a pattern of racketeering activity"), *cert. denied*, 456 U.S. 943, 102 S.Ct. 2006, 72 L.Ed.2d 474 (1983). In subsequent cases, including the instant one, however, the Eleventh Circuit appears to have abandoned support for the personal commission rule. *See also United States v. Starrett*, 55 F.3d 1525 (11th Cir. 1995), *cert. denied*, ___ U.S. ___, 116 S.Ct. 1359, 134 L.Ed.2d 534 (1996).

This Court should grant the instant petition to clarify the meaning of RICO conspiracy by holding that the severe sanctions attendant to a RICO conspiracy conviction require personal responsibility and, therefore, an agreement to personally commit two predicate acts. The Court has allowed this split in the circuits to stand long enough. *See Pryba v. United States*, 498 U.S. 924, 111 S.Ct. 305-06, 112 L.Ed.2d 258 (1990) (White, J., dissenting from denial of certiorari on this issue); *Adams v. United States*, 474 U.S. 971, 106 S.Ct. 336, 88 L.Ed.2d 321 (1985) (White, J., dissenting from denial of certiorari on this issue).

The personal commission rule is compelled by the plain language of RICO itself. A person cannot agree to "conduct" or "participate" in something (here, the affairs of an "enterprise") by agreeing that *someone else* will do something (commit crimes). The absurdity of such an agreement is demonstrated by examining what the agreement, if consummated by the commission of a substantive RICO violation,

would mean. If such an agreement was ever consummated, the defendant would not have done anything to "conduct" or "participate" in the enterprise at all. The "conduct" and "participation" would have only been committed by the conspirator who committed the predicate acts. The definition of RICO conspiracy adopted by the Eleventh Circuit herein thus effectively eliminates the terms "conduct" and "participate" from the statute. This Court has already cautioned against interpretations of RICO which eliminate these very terms. *See Reves v. Ernst & Young*, 507 U.S. 170, 113 S.Ct. 1163, 122 L.Ed.2d 525 (1993).

The personal commission rule is also compelled by fundamental concepts of criminal law. Criminal law focuses on individual responsibility. *See generally* Hopkins, *Mens Rea and the Right to Trial by Jury*, 76 CAL. L. REV. 391 (1988) ("[t]here is broad and longstanding societal consensus that there should be no criminal punishment without moral blameworthiness"). Although RICO is innovative, it was not intended to cause a "radical expansion of federal conspiracy law." *United States v. Anderson*, 626 F.2d 1358, 1369 (8th Cir. 1980), *cert. denied*, 450 U.S. 912, 101 S.Ct. 1351, 67 L.Ed.2d 336 (1981) (citations omitted). Therefore, adoption of the personal commission rule will prevent the conviction of "those who might otherwise be convicted through guilt by association." *Winter*, 663 F.2d at 1136.

Unlike prior cases where this Court has denied certiorari on this issue, Petitioners were severely prejudiced by the

Eleventh Circuit's definition of RICO conspiracy. When the jury was required to agree unanimously as to the specific criminal conduct allegedly committed by the Petitioners, the jury either acquitted them or could not reach any verdict as to all but 2 of the 104 counts in the indictment. Yet, the jury convicted Petitioners of RICO conspiracy -- the charge about which it was concededly confused.[6] The RICO conspiracy charge also was unique in that it authorized convictions based upon a definition of the prohibited "agreement" which encompassed numerous acts which were committed *only* by other conspirators. The only connection to Petitioners was the RICO "enterprise," which in the instant case was a *legitimate* entity -- the Eleventh Judicial Circuit for the State of Florida. The instant case, therefore, presents the Court with its best opportunity to resolve this long-standing split in the Circuits.

## CONCLUSION

For both of the foregoing reasons, Petitioners respectfully request that their Petition For a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit be granted.

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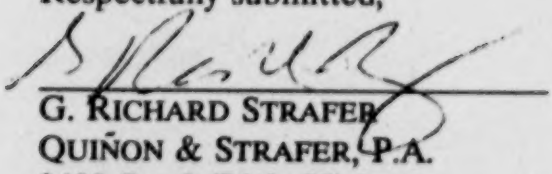
[6] Shenberg was also convicted of the extortion charge in Count 90. However, since RICO and RICO conspiracy require *two* predicate acts, Shenberg's conviction on Count 90 does not render the instructional error harmless. Goodhart was convicted *only* of RICO conspiracy. Neither of the two remaining co-defendants, Davis and Sepe, was convicted of *any* counts.

Respectfully submitted,



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# APPENDIX

United States of America,

Plaintiff-Appellee-Cross-Appellant,

v.

Harvey N. Shenberg,

Defendant-Appellant-Cross-Appellee,

David Goodhart,

Defendant-Appellant.

United States of America,

Plaintiff-Appellant,

v.

Harvey N. Shenberg, Alfonso C. Sepe,

Defendants-Appellees.

Nos. 93-4798, 93-4906.

United States Court of Appeals
Eleventh Circuit.

July 12, 1996

Circuit court judge and a lawyer were convicted in the United States District Court for the Southern District of Florida, No. 91-708-CR-JAG, Jose A. Gonzalez, Jr., J., of conspiracy to violate Racketeer Influenced and Corrupt Organizations Act (RICO), and judge was also convicted of attempted extortion. Defendants appealed and government cross-appealed sentences and

district court's ruling barring reprosecution on acquitted counts. The Court of appeals, Hatchett, Circuit Judge, held that: (1) evidence was sufficient to support RICO conspiracy convictions; (2) district court acted within its discretion in denying defendants' request for special verdict on RICO conspiracy count; (3) district court acted within its discretion when it failed to replace pregnant juror after dismissing her for cause during deliberations; (4) juror's presentation to court security officer of cocaine-laced bag she found in jury bathroom was not a "communication" that court was required to disclose; (5) district court, in sentencing defendant judge, erred in applying two-point enhancement for "more than minimal planning"; (6) district court, in sentencing defendant lawyer, properly applied special skill enhancement; (7) collateral estoppel applied to bar use of acquitted counts as predicate acts in substantive RICO counts in retrial on mistried counts; but (8) collateral estoppel did not bar government from using predicate acts that mirrored acquitted substantive counts to prove RICO conspiracy.

Convictions affirmed and resentencing ordered.

1. Criminal Law

Court of Appeals reviews sufficiency of evidence claims in light most favorable to government, drawing all reasoning inferences and credibility choices in favor of jury's verdict.

2. Criminal Law

If reasonable person could find that evidence establishes guilt beyond reasonable doubt, jury's verdict must stand.

3. Criminal Law

Acquittal of defendants and other codefendants on other counts alleging similar or related conduct was irrelevant to issue of whether sufficient evidence supported defendants' convictions of conspiracy to violate Racketeer Influenced and Corrupt Organizations Act (RICO); seemingly inconsistent verdicts could have easily been result of mistake or lenity by jury in acquittal as they could have been proof of lack of evidence to support conviction.

4. Conspiracy

To establish conspiracy to violate Racketeer Influenced and Corrupt Organizations Act (RICO), government must prove that defendant objectively manifested, through words or actions, agreement to participate in conduct of affairs of enterprise. 18 U.S.C.A. § 1962(d).

5. Conspiracy

Government can prove existence of agreement, as required to support conviction of conspiracy to violate Racketeer Influenced and Corrupt Organizations Acts (RICO), by proving either that defendant agreed to overall objective of conspiracy, or that

defendant personally committed two predicate acts, thereby participating in a single objective conspiracy. 18 U.S.C.A. § 1962(d).

6. Conspiracy

To prove that defendant agreed to overall objective of conspiracy, as would support proof of conspiracy to violate Racketeer Influenced and Corrupt Organizations Act (RICO), government can use circumstantial evidence to show that each defendant must necessarily have known that others were also conspiring to participate in same enterprise through pattern of racketeering activity. 18 U.S.C.A. § 1962(d).

7. Conspiracy

Finding that circuit court judge agreed to corruptly utilize circuit court system, in conspiracy to violate Racketeer Influenced and Corrupt Organizations Act (RICO), was supported by evidence of defendant's participation with another judge in acceptance of kickbacks on court appointments, defendant's counseling of other judge on how to conduct illegal transactions, defendant's disclosure of confidential informant's name and defendant's holding, concealing and disbursing of proceeds derived from court appointments and case fixing. 18 U.S.C.A. §1962(d).

8. Conspiracy

Finding that lawyer agreed to overall objective of conspiracy to violate Racketeer Influenced and Corrupt Organizations Act (RICO) by corruptly utilizing circuit court system was supported by evidence that defendant agreed to act as bag man for circuit judge, that defendant arranged with that judge to fix case, that defendant agreed to arrange and arranged with judge to fix another case, and that defendant attempted to bribe another judge. 18 U.S.C.A. § 1962(d).

9. Conspiracy

To sustain conviction for conspiracy to violate Racketeer Influenced and Corrupt Organizations Act (RICO) based upon commission of two predicate acts, government must show that predicate acts are related and amount to or pose threat of continued criminal activity. 18 U.S.C.A. § 1962(d).

10. Conspiracy

Lawyer's six-month involvement in case fixing posed threat of continued criminal activity sufficient to support his conviction for conspiracy to violate Racketeer Influenced and Corrupt Organizations Act (RICO). 18 U.S.C.A. § 1962(d).

11. Criminal Law

District Court's denial of request of special verdict is reviewed for abuse of discretion.

12. Criminal Law

District court's use of general verdict for multi-object conspiracy, though disfavored, does not violate defendant's Sixth Amendment rights; nor does district court's refusal to require special verdict provide independent basis for reversing otherwise valid conviction. U.S.C.A. Cons.Amend.6.

13. Criminal Law

District court acted within its discretion in denying defendants' request for special verdict on count charging conspiracy to violate Racketeer Influenced and Corrupt Organizations Act (RICO), where court properly instructed jury on elements of RICO conspiracy violation and there was no evidence that jury failed to adhere to district court's instructions. 18 U.S.C.A. § 1962(d).

14. Criminal Law

Court of Appeals presumes that jury follows trial court's instructions.

15. Criminal Law

District court's decision to continue deliberations with 11-member jury is reviewed for abuse of discretion. Fed.Rules Cr.Proc. Rule 23(b), 18 U.S.C.A.

16. Jury

District court acted within its discretion when it failed to replace pregnant juror after dismissing her for cause during deliberations, where jury had deliberated for a month prior to juror's dismissal. Fed.Rules Cr.Proc.Rule 23(b), 18 U.S.C.A.

17. Criminal Law

Juror's presentation to court security officer of cocaine-laced bag she found injury bathroom was not a "communication" that court was required to disclose, where juror presented bag without comment on its effects on her ability to deliberate, but even if it was, court's failure to respond, for fear that appearance of suspicion concerning integrity of any juror would not serve interest of justice, was harmless. Fed.Rules Cr.Proc.Rule 23(a), 18 U.S.C.A.

See publication Words and Phrases for other judicial constructions and definitions.

18. Criminal Law

Sentencing court's findings of fact are reviewed for clear error, and court's application of those facts to Sentencing Guidelines is reviewed de novo. U.S.S.G. § 1B1.1 et seq., 18 U.S.C.A.

19. Criminal Law

In sentencing circuit court judge for conspiracy to violate Racketeer Influenced and Corrupt Organizations Act (RICO) and extortion induced under color of official right, district court properly applied cross referencing provision and borrowed applicable guidelines for conviction for conspiracy to commit murder, finding that, in government sting operation in which government created fictitious confidential informant and drug trafficker, judge disclosed confidential informant's name for payment with knowledge that trafficker intended to murder informant and that judge participated in planning of the murder in requiring that murder not occur for at least 45 days. 18 U.S.C.A. §§ 1951, 1962(d); U.S.S.G. § 2C1.1(c)(1), 18 U.S.C.A.

20. Criminal Law

Sentencing Guidelines are given their plain meaning effect, except in most extraordinary situation where language leads to absurd result contrary to clear legislative intent. U.S.S.G. § 1B1.1 et seq., 18 U.S.C.A.

21. Criminal Law

In sentencing circuit court judge for conspiracy to violate Racketeer Influenced and Corrupt Organizations Act (RICO) and extortion induced under color of official right, district court properly applied "vulnerable victim" enhancement, despite fact that

confidential informant who was victim of alleged murder conspiracy was fictitious, where judge disclosed informant's name in exchange for payment, knowing that state requested that his name remain under seal and knew that drug trafficker, who was also fiction created by government, intended to murder informant. 18 U.S.C.A. §§ 1951, 1962(d); U.S.S.G. § 3A1.1, 18 U.S.C.A.

22. Criminal Law

In sentencing circuit court judge for conspiracy to violate Racketeer Influenced and Corrupt Organizations Act (RICO) and extortion induced under color of official right, "more than minimal planning' enhancement could not apply, where victim was fictitious; Sentencing Guideline required an actual assault. 18 U.S.C.A. §§ 1951, 1962(d); U.S.S.G. § 2A2.1(b)(1), 18 U.S.C.A.

23. Criminal Law

When reviewing whether district court properly departed from Sentencing Guidelines, Court of Appeals first determines whether Sentencing Commission adequately considered particular factors district court relied on for basis of its departure; then, assuming the Sentencing Commission did not adequately consider the factors, court determines whether district court's reliance on those factors furthers objective of the guidelines; and finally, if those factors further objectives of guidelines, court determines reasonableness of district court's departure. U.S.S.G. § 1B1.1 et seq., 18 U.S.C.A.

24. Conspiracy

Extortion and Threats

In sentencing circuit court judge for conspiracy to violate Racketeer Influenced and Corrupt Organizations Act (RICO) and extortion induced under color of official right, district court properly departed upward five levels based upon court's finding that judge's conduct was part of systematic corruption of governmental function causing loss of public confidence in government; Sentencing Commission did not adequately account for systematic corruption resulting in loss of public confidence in government, district court's reliance on this factor furthered objectives of guidelines, and amount of departure was reasonable. 18 U.S.C.A. §§ 1951, 1962(d); U.S.S.G. § 2C1.1, comment. (n.5), 18 U.S.C.A.

25. Criminal Law

For purposes of sentencing guidelines, government must prove facts "used" in sentencing by preponderance of evidence. U.S.S.G. § 1B1.1 et seq., 18 U.S.C.A.

26. Criminal Law

In sentencing circuit court judge for conspiracy to violate Racketeer Influenced and Corrupt Organizations Act 9RICO), and extortion induced under color of official right, district court could

take judicial notice of public reaction to case and consider it in making its decision to depart from Sentencing Guidelines. 18 U.S.C.A. §§ 1951, 1962(d); U.S.S.G. § 1B1.1 et seq., 18 U.S.C.A.; Fed.Rules Evid.Rule 201, 28 U.S.C.A.

27. Criminal Law

District courts may not enhance sentence on basis of same incidents that they used to determine base level for sentencing.

28. Criminal Law

In sentencing circuit court judge for conspiracy to violate Racketeer Influenced and Corrupt Organizations Act 9RICO) and extortion induced under color of official right, no double counting occurred when district court applied two point enhancement for abuse of position of trust and departed upward five levels based on finding that judge's conduct was part of systematic corruption of governmental function causing loss of public confidence in government; court did not base its decision to depart on same considerations that motivated its application of abuse of position of trust enhancement. 18 U.S.C.A. §§ 1951, 1962(d); U.S.S.G. §3B1.3, 18 U.S.C.A.

29. Criminal Law

Sentence enhancement based on special skill is reviewed for clear error. U.S.S.G. § 3B1.3, 18 U.S.C.A.

30. Criminal Law

In sentencing lawyer for conspiracy to violate Racketeer Influenced and Corrupt Organizations Act (RICO) for fixing drug case, district court properly added two-point enhancement for use of special skill, based on finding that, as part of conspiracy, defendant read arrest affidavits, reviewed pleadings, proposed suppression orders, and made suggestions based on his experience and education as to amount of bond, booking procedure and possibility of appeal of suppression order. 18 U.S.C.A. § 1962(d); U.S.S.G. § 3B1.3, 18 U.S.C.A.

31. Criminal Law

District court properly sentenced defendant under 1989, rather than 1990, Sentencing Guidelines, finding that defendant's participation in conspiracy ended in July 1990. U.S.S.G. § 1B1.1 et seq., 18 U.S.C.A.

32. Criminal Law

Court of Appeals reviews questions of law de novo.

33. Double Jeopardy

Double jeopardy clause of Fifth Amendment does not apply in context of retrial of mistried counts, since retrial is continuation of original jeopardy. U.S.C.A. Const.Amend. 5.

34. Judgment

Although double jeopardy does not bar government from reprosecuting defendants on mistried counts, estoppel principles may nevertheless apply to preclude government from relitigating certain issues on retrial. U.S.C.A. Const. Amend. 5.

35. Double Jeopardy

Double Jeopardy clause does not limit application of collateral estoppel to only cases in which double jeopardy applies. U.S.C.A. Const.Amend. 5.

36. Judgment

Doctrine of collateral estoppel applies when issue of ultimate fact has once been determined by valid and final judgment; in such instances, same parties cannot relitigate ultimate issue in any further lawsuit.

37. Judgment

When determining whether collateral estoppel applies in context of retrial, court must first examine verdict and record to see what facts, if any, were necessarily determined in acquittal at first trial, and then court must determine whether previously determined facts constituted essential element of mistried count.

38. Judgment

Direct estoppel barred government from using acquitted counts as predicate acts in substantive racketeer Influenced and corrupt Organizations Act (RICO) count during retrial on mistried counts, where most of the crimes defendants were charged with mirrored predicate acts listed in the substantive RICO count, so that acquitted counts necessitated finding that jury also decided predicates acts which mirrored acquitted counts in defendants' favor in first trial. 18 U.S.C.A. § 1962.

39. Judgment

Collateral estoppel did not preclude government from introducing evidence if offered to support acquitted counts as predicate acts in Racketeer Influenced and Corrupt Organizations Act (RICO) conspiracy count; although predicate acts in RICO conspiracy count mirrored crimes charged in indictment, acquitted counts did not necessitate finding that ultimate issue of fact, i.e., agreement to commit two or more predicate acts or agreement to overall objective of enterprise, was necessarily determined. 18 U.S.C.A. § 1962(d).

40. Conspiracy

Actual commission of underlying crime does not constitute essential element of Racketeer Influenced and Corrupt Organizations Act (RICO) conspiracy. 18 U.S.C.A. § 1962(d).

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Anne R. Schultz, Asst. U.S. Atty., Kendall Coffey, U.S. Attorney, Linda Collins Hertz, Lawrence D. Levecchio, Dennis R. Bedard, Asst. U.S. Attys., Miami, FL, for the U.S. in No. 93-4906.

Richard Strafer, Quinon & Strafer, P.A., Miami, FL, for Shenberg & Sepe in No. 93-4906.

Appeals from the United States District Court for the Southern District of Florida.

Before HATCHETT and BARKETT, Circuit Judges, and GODBOLD, Senior Circuit Judge.

HATCHETT, Circuit Judge:

In these "Operation Court Broom" appeals, we affirm the convictions and order resentencing of one of the appellants. The

facts that follow are either undisputed or represent factual inferences that the jury was entitled to draw.

## FACTS

In November 1988, the citizens of Dade County, Florida, elected judicial candidate Roy T. Gelber to the Circuit Court of the Eleventh Judicial Circuit of Florida. Gelber, prior to taking office, arranged with his former law partner, Stephen Glass, to appoint Glass as special assistant public defender (SAPD). In return for SAPD appointments, Glass agreed to give Gelber one-third of the fees received.[1] Gelber made similar kickback arrangements with other lawyers in Miami while in office.[2] Also in 1988, Gelber became close friends with Dade County Court judicial candidate Harvey N. Shenberg. Shenberg, so also won his bid for election, advised Gelber regarding the acceptance of kickbacks and other illegal schemes. During one of Shenberg's conversations with Gelber, Shenberg suggested that Gelber add one of Shenberg's former law partners, Manny Casabielle, to the court appointment

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[1] As a circuit judge in the criminal division, Gelber had authority to appoint private attorneys as SAPDs to represent indigent defendants when a conflict of interest arose with the Public Defender's Office. Gelber, however, never received any kickbacks from the Glass appointments.

[2] Miami attorneys William Castro, Kent Wheeler, Arthur Luongo, Randolph Ferguson, Harry Boehme, and Nancy Lechtner all paid Gelber twenty to twenty-five percent of the SAPD fees they received.

list in exchange for kickbacks of twenty-five percent. Gelber agreed. Thereafter, Shenberg periodically gave Gelber money in amounts ranging from $500 to $1,200 on Casabielle's behalf. Oftentimes, Gelber directed Shenberg to hold the money for safekeeping. During this same time period, Circuit Judge Alfonso C. Sepe talked with Gelber about appointing Arthur Massey, a private lawyer, as SAPD. Gelber appointed Massey in two cases for which Massey paid Gelber $1,000 in cash. Gelber eventually grew concerned that his repeated appointments of the same lawyers would raise suspicion; thus, in an attempt to avoid detection, Judge Sepe began appointing lawyers from Gelber's court appointment list.

State and federal officials (the government) eventually learned of the kickback scheme, and in 1989, the government launched a sting operation called "Operation Court Broom" to investigate corruption in the Circuit Court of Dade County. The government employed Raymond Takiff, a lawyer and a longtime friend of Gelber, to work undercover and tape-record telephone conversations and meetings with Gelber and others suspected of corruption. In August 1989, Takiff, posing as a corrupt lawyer with ties to a fictitious South American drug trafficker named "Peter," approached Gelber requesting Gelber's assistance in influencing criminal cases pending against Peter's employees. Gelber accepted $11,000 from Takiff and gave Shenberg $5,000 of the money to place in Shenberg's home safe. The next month, Takiff asked Gelber to investigate whether Peter's employee, Jose Angel Rapard, cooperated with authorities in exchange for the

dismissal of an attempted murder charge pending against him. During their meeting, Takiff disclosed to Gelber that Peter believed that Rapard informed the police of a pending cocaine deal in exchange for the dismissal of the charge. Gelber and Shenberg, after reviewing Rapard's court file, agreed that the circuit judge handling the case dismissed it after the victim failed to appear. Gelber subsequently reported to Takiff that the circuit judge dismissed the attempted murder charges against Rapard for legitimate reasons.

Several months later, in March 1990, Takiff informed Gelber that the police searched one of Peter's employee's hotel room pursuant to a warrant Gelber signed.[3] Takiff told Gelber that Peter wanted the $143,000 in cash and jewelry seized in the search returned and information regarding the identity of the confidential informant. Gelber initially told Takiff that he could not assist him because he placed the warrant affidavit under seal. Gelber, however, subsequently agreed to hear Takiff's motion to return property and unseal the affidavit. After Gelber's meeting with Takiff, Gelber discussed Takiff's latest request with Shenberg. Gelber told Shenberg that he intended to receive a portion of the

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[3] As part of the undercover sting operation, officers presented Gelber with a fictitious search warrant affidavit seeking authorization to search a motel room for narcotics and cash. The warrant affidavit contained the name of a confidential informant who provided the information supporting the warrant. Gelber signed the warrant and ordered that the affidavit remain sealed to protect the name of the informant.

seized jewelry and money as payment for granting the motion. Shenberg responded stating that he did not believe that the request would raise any "red flags."

On March 20, 1990, Gelber conducted a hearing on Takiff's motion to return property and to unseal the affidavit. Gelber deferred ruling on the motion until March 22, 1990, and ordered the prosecutor to provide him with a copy of the sealed affidavit for *in camera* review. The following day, after Gelber had made a photocopy of the affidavit, he met with Takiff intending to provide Takiff with the name of the informant. Before Gelber divulged the name, Takiff informed Gelber that Peter intended to kill the informant. After learning of the murder plot, Gelber refused to disclose to Takiff the name of the informant. The next morning, Gelber ruled on the motion to return property ordering that the state return the seized jewelry to the defendant, that the state file a forfeiture action within ten days or return the seized cash, and that the warrant affidavit remain under seal to protect the informant's identity. Later that evening, Gelber met with Shenberg to inform him that Peter intended to kill the informant. Shenberg responded to this news stating, "I don't know what the big deal is. He's just a drug dealer." Subsequently, Shenberg decided to disclose the informant's name to Takiff, and on March 24, 1990, Shenberg met with Takiff for the first time. Shenberg, identifying himself as Gelber's best friend, stated that he had the information Takiff requested from Gelber. Shenberg then told Takiff that he had the information Takiff requested from Gelber. Shenberg then told Takiff that he would provide him with the name of the

informant upon three conditions: (1) that Peter not murder the informant for forty-five days; (2) that Peter pay Shenberg $50,000; and (3) that Gelber receive a portion of the seized money and jewelry. Takiff agreed to Shenberg's terms, and Shenberg provided him with the name of the informant and facts contained in the affidavit.[4] In return, Takiff gave Shenberg $25,000 on April 2, 1990, as a partial payment for the informant's name and paid the remaining $25,000 on May 15, 1990. On May 16, 1990, Takiff gave Gelber $20,000 for his share of the seized money and property. Due to the success of the transaction, Shenberg and Gelber agreed that Takiff would deal directly with Shenberg in the future.

On July 5, 1990, Takiff telephoned Shenberg at his home requesting that Shenberg expedite a bond hearing for another one of Peter's employees. While on the Telephone, Takiff stated that he had $10,000 to $12,000 available and that "the level of gratitude will at least be equal to that shown in the past." Shenberg told Takiff that he was unable to assist him but consented to meet with Takiff the next day. At their meeting the following morning, Shenberg angrily stated,

> thanks to the phone call, we're dead meat. I mean, we're never going to be able to do anything again. . . I'm never going to talk on the phone with someone who talks that

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[4] Shenberg told Takiff that the name of the informant was "Dionesio Jose Gajera." The actual name contained in the affidavit was "Dionesio Jose Guerajo."

> way . . . if you would have heard the conversation, God forbid it was recorded, it was the worse conversation that I ever, ever heard.

Shenberg met with Gelber later that morning and discussed the possibility that Takiff was an informant. Although Gelber did not believe Takiff was an informant and tried to alleviate Shenberg's concern, Shenberg told Gelber that Shenberg would not resume his dealings with Takiff.

In September 1990, Takiff approached Circuit Judge Phillip Davis seeking his assistance with case-fixing. David told Takiff that he, Gelber, and Shenberg intended to join up with him, stating that "we want to make some money, man." The following week, Takiff gave Davis a list of four names and asked Davis to determine whether these persons had any outstanding warrants against them. Davis provided the information. After learning that two of the persons had outstanding warrants, Takiff asked Gelber to fix the outstanding warrants against them. Gelber informed Takiff that he could only fix the warrant for the individual's case assigned to Circuit Judge Arthur Snyder. Following this discussion, Gelber conferred with Shenberg to discuss the possibility of influencing the case pending before Snyder. Shenberg, still expressing distrust for Takiff, stated that he believed Sepe should approach Snyder. Sepe agreed to approach Snyder on Takiff's behalf. Sepe, however, later informed Gelber that Snyder would not agree to fax the warrant. Consequently, Gelber reported to Takiff that he could not assist him on this matter.

In December 1990, the government assigned two fictitious drug trafficking cases to Sepe's criminal docket. A short time later, Takiff informed Gelber that outstanding warrants existed against Peter's sister-in-law, Bonnie Carrillo, and her husband, Hector Penna. Takiff also informed Gelber that Peter wished to obtain low bail on Carrillo and the dismissal of the charges against her through a motion to suppress the evidence. Gelber conferred with Shenberg and discussed his conversation with Takiff. Again, Shenberg stated that he had bad feelings about Takiff feelings about Takiff and cautioned Gelber about dealing with Takiff. Gelber then attended a meeting with Sepe. At this meeting, Sepe stated he had no problem with complying with Takiff's request. Following this meeting, Gelber met with Takiff requesting $325,000 in advance. Takiff complained about Gelber's terms and inquired whether the $325,000 figure included the dismissal of the charges against both Carrillo and Penna. Sepe and Gelber subsequently agreed that they would fix the cases for $200,000 for each person. On December 19, 1990, Gelber told Takiff that Sepe wanted the transaction completed on that day or not at all. Takiff failed to comply with the deadline, and Sepe cancelled the deal.

On December 28, 1990, Gelber again approached Sepe about the Carrillo case, informing him that Takiff could now proceed with the transaction. Sepe agreed to resume the negotiations with Takiff on the condition that David Goodhart, a lawyer, receive the bribery payment from Takiff. Goodhart agreed to act as "bag man" in return for $25,000 of Gelber's share of the bribery payment. Thereafter, Takiff conducted all future dealings

with Goodhart. Takiff first met with Goodhart on January 8, 1991, and explained to Goodhart that the outstanding warrant against Carrillo concerned Peter most because of their relation and that Peter would pay any amount within reason to get the matter solved. Goodhart at that point wrote $150,000, $150,000 on a legal pad stating that the transaction involved "two different things." In response, Takiff asked whether Sepe could fix the case for $200,000, and Goodhart responded that he had to discuss the new terms with Sepe. The following weeks, Takiff and Goodhart had several conversations concerning the Carrillo case; finally, on February 11, 1991, during a meeting, Takiff attempted to give Goodhart $75,000 in cash agreeing to pay another $75,000 upon dismissal of Carrillo's charges. Goodhart refused to accept the money noting that Sepe expected full payment. Approximately two weeks later, Takiff gave Goodhart $150,000 in cash. The following afternoon, Takiff brought Carrillo to Sepe's courtroom so that the state could arrest her. Sepe, over the state's objection, released Carrillo on $50,000 bail.

Takiff subsequently filed a motion to suppress the cocaine that had been seized. On April 2, 1991, Sepe conducted an evidentiary hearing and granted Carrillo's motion to suppress. The next day, Takiff gave Goodhart a proposed order suppressing the evidence in the Carrillo case. After reviewing the order, Goodhart discussed the Penna case. Both Takiff and Goodhart concluded that Penna, unlike Carrillo, did not have standing to contest the legality of the seizure. Consequently, they agreed to find alternative grounds to dismiss the charges against Penna. A few weeks later,

Sepe gave Gelber a folder containing $50,000 in cash stating that "these are the papers that you've been waiting for." Gelber then gave $10,000 to Shenberg to place in Shenberg's safe admitting that he obtained the money from fixing Carrillo's case.

On May 2, 1991, Takiff discussed with Goodhart a case pending before Circuit Judge Ellen Morphonios stating that Peter also wished to secure the release and the dismissal of that case. Goodhart, believing that Judge Morphonios would fax the case for $75,000, approached Morphonios on Takiff's behalf. On May 14, 1991, Goodhart met with Takiff and told him that Morphonios refused to fix the case. The state, on June 3, 1991, dismissed the case against Carrillo because it lacked sufficient evidence to prosecute. The next day, Goodhart told Takiff to surrender Penna in Sepe's courtroom during the week of June 19. On June 8, 1991, the government ended "Operation Court Broom" and executed search warrants at the homes and offices of Gelber, Shenberg, Sepe, Goodhart, and Davis. During the execution of the search warrant, government agents seized monies matching the serial numbers of Takiff's April 2, 1990 and February 26, 1991 bribery payments to Gelber, Sepe, Shenberg and Goodhart. Shortly after the seizure, Gelber agreed to cooperate with the government in its investigation of corruption in the Dade County Circuit Court.

## PROCEDURAL HISTORY

On May 27, 1992, a grand jury in the Southern District of Florida returned a 106-count superseding indictment against

Shenberg, Goodhart, Sepe, Davis, and five other defendants. Count 1 charged all of them with conspiring to violate the Racketeer Influenced and Corrupt Organization Act (RICO) in violation of 18 U.S.C. § 1962(d); Count 2 charged Shenberg, Goodhart, Sepe, Davis, and one codefendant with violation of RICO provisions 18 U.S.C. §§ 1962(c) and 1963(a).[5] The indictment also charged Shenberg with attempted extortion, in violation of 18 U.S.C. §§ 1951 and 2 (Counts 87, 90, 97, 98); conspiracy to commit extortion, in violation of 18 U.S.C. § 1951 (Count 92); and money laundering, in violation of 18 U.S.C. § 1956(a)(1)(A)(i) and (a)(1)(b)(i) (Counts 88 and 91. The indictment charged Goodhart with attempted extortion, in violation of 18 U.S.C. §§ 1951 and 2 (Counts 97, 104, and 106); conspiracy to commit extortion, in violation of 18 U.S.C. § 1951 (Count 103); and money laundering, in violation of 18 U.S.C. § 1956(a)(1)(A)(1) (Counts 98 through 100). The indictment charged Sepe with conspiracy to commit extortion, in violation of 18 U.S.C. § 1351, (Counts 95 and 103); attempted extortion, in violation of 18 U.S.C. §§ 1951 and 2 (Counts 3, 4, 89, 96, 97, and 104); mail fraud, in violation of 18 U.S.C. §§1341, 1346, and 2 (counts 61 through 80); and money laundering, in violation of 18 U.S.C. § 1956(a)(1)(A)(i) and (a)(1)(B)(i) (Counts 98 and 100 through 102).

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[5] The grand jury also indicted Arthur Massey, William Castro, Arthur Luongo, Harry Boehme, and Nancy Lechtner. Gelber, an unindicted co-conspirator, pleaded guilty to RICO conspiracy and testified for the government against Shenberg, Goodhart, Sepe, Davis and the other codefendants.

On May 13, 1993, the district court severed the trial of Shenberg, Goodhart, Sepe, and Davis from the trial of the remaining defendants. On September 21, 1992, the trial commenced. Approximately fifteen weeks into the trail a juror discovered a cocaine-laced baggie in the jury room bathroom. The district court did not inform the parties of the juror's discovery or conduct a hearing at that time. At the close of the evidence, the defense requested a special verdict on Counts 1 and 2 requiring the jury to identify which predicate acts each defendant committed. The district court required a special verdict on Count 2; however, it denied their request with respect to Count 1. The defense also requested the district court to replace a pregnant juror prior to jury deliberations. The district court also denied this request.

The jury began deliberating on March 11, 1993. On April 15, 1993, the pregnant juror went into labor causing the district court to stay deliberations until April 26. On April 26, the district court dismissed the pregnant juror for cause because her physician would not authorize her return on that date. Then, the district court instructed the remaining eleven jurors to continue deliberations. Later that day, the jury returned the following verdicts: Shenberg - guilty of Counts 1 and 90, not guilty of Counts 87, 88, 97, 98 and the jury could not reach a verdict on Counts 2, 91 and 92; Goodhart - guilty on Count 1, not guilty on Count 99, and the jury could not reach a verdict as to Counts 2, 97, 98, 103, and 104; Sepe - not guilty on Counts 4, 61 through 80, 89, 95 through 98, 101, and the jury could not reach a verdict on Counts 1 through 3, 103 and 104. The jury acquitted Davis on all counts.

On May 6, 1993, the district court conducted an evidentiary hearing on the discovery of the cocaine-laced baggie in the jury room. Following the evidentiary hearing, Shenberg and Goodhart filed motions for new trial. On May 24, 1993, Shenberg, Goodhart, and Sepe filed motions for acquittal. They also filed a motion to bar the government from using acquitted counts as predicate acts in Counts 1 and 2. On July 14, 1993, the district court denied Shenberg and Goodhart's motions for new trial. The court granted the motion for judgment of acquittal in part, and denied it in part, dismissing Count 104 against Goodhart and Sepe. On July 15, 1993, the district court granted motions to bar reprosecution on acquitted counts. Thereafter, the court sentenced as follows: Shenberg to 188 months imprisonment and 3 years supervised release for RICO conspiracy and extortion; Goodhart to 99 months imprisonment, 3 years supervised release, and a $100 assessment for RICO conspiracy. The government wishes to retry Shenberg and Sepe on the mistried counts. The government does not wish to retry Goodhart as to Counts 2, 97, 98 and 103. Shenberg and Goodhart appeal their convictions and sentences, and the government cross-appeals.

## CONTENTIONS

Appellants Shenberg and Goodhart raise several contentions on appeal. First, appellants contend that insufficient evidence supports their RICO conspiracy convictions claiming that the government failed to prove that they agreed to personally commit or agreed to have others commit two predicate acts. Second,

appellants contend that the district court's denial of their request for a special verdict on the RICO conspiracy count denied them their Sixth Amendment right to a fair trial. Third, appellants contend that the district court abused its discretion in continuing jury deliberations with only eleven jurors after dismissing the twelfth juror for cause. Fourth, appellants contend that the juror's discovery of a cocaine-laced baggie constituted a communication, and the court erred in failing to disclose the discovery to the appellants. Finally, appellants contend that the district court improperly calculated Shenberg's sentence under the 1989 Sentencing Guidelines and Goodhart's sentence under the 1990 Sentencing Guidelines.

On cross-appeal, the government contends that the district court erroneously applied the 1989 Sentencing Guidelines in sentencing Shenberg, claiming that Shenberg's racketeering activity continued past the date that the 1990 Sentencing Guidelines took effect. The government also contends on cross-appeal that the district court erred in ruling that the doctrine of collateral estoppel bars the use of acquitted counts as predicate acts for substantive RICO and RICO conspiracy charges in a retrial of mistried counts.

## ISSUES

The following issues presented are: (1) whether sufficient evidence supports appellants' convictions; (2) whether the district court acted within its discretion in denying appellants' request for a special verdict on the RICO conspiracy count; (3) whether the

district court abused its discretion in continuing jury deliberations with an eleven-member jury; (4) whether the district court erred in failing to inform appellants that a juror found a cocaine-laced baggie in the jury room; (5) whether the district court properly sentenced appellants under the Sentencing Guidelines; and (6) whether the doctrine of collateral estoppel bars the government from introducing evidence of acquitted conduct at retrial.

## DISCUSSION

### A. Sufficiency of the evidence

[1, 2] We review sufficiency of the evidence claims in the light most favorable to the government drawing all reasonable inferences and credibility choices made in favor of the jury's verdict. *United States v. Gilbert,* 47 F.3d, 1116, 1118 (11th Cir. 1995). If a reasonable person could find that the evidence establishes guilt beyond a reasonable doubt, the jury's verdict must stand. *United States v. Jones,* 933 F.2d 1541, 1546 (11th Cir. 1991).

Appellants contend on appeal that insufficient evidence supports their RICO conspiracy convictions arguing that the government failed to prove that appellants each either agreed to personally commit two predicate acts or agreed to have others commit two or more such acts. Shenberg asserts that his acquittal on Counts 87, 88, 97, and 98, which mirrored predicate acts 4 and 10 of the substantive RICO counts, and the jury's inability to reach

a verdict on Count 92, which mirrored predicate act 7, subjected him to liability for only one predicate act, act 6.[6] Similarly, Goodhart asserts that his acquittal on Count 99 only subjected him to liability for his actions in the Carrillo case as set forth in predicate act 10.

[3] We first note that neither the acquittal of appellants nor their codefendants on other counts alleging similar or related conduct is relevant to the issue of whether sufficient evidence supports appellants' RICO conspiracy convictions. *United States v. Church*, 955 F.2d 688, 695 (11th Cir.), *cert. denied*, 506 U.S. 881, 113 S.Ct. 233, 121 L.Ed.2d 169 (1992). These verdicts though seemingly inconsistent "could [have] easily [been] the result of mistake or lenity by the jury in acquittal as they could be proof of lack of evidence to support the conviction." *Church*, 955 F.2d at 695. For this reason, we insulate acquittal verdicts from our review of the sufficiency of the evidence.

[4-6] To establish a RICO conspiracy violation under 18 U.S.C. § 1962(d), the government must prove that a defendant "objectively manifested, through words or actions, an agreement to participate in the conduct of the affairs of the enterprise." The government can prove the existence of a RICO conspiracy agreement in one of two ways. *United States v. Russo*, 796 F.2d 1443, 1455 (11th Cir. 1986). the government may either prove (1)

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[6] The indictment charged Shenberg with predicate acts 4, 6, 7 and 10 and charged Goodhart with acts 10, 11 and 13.

that a defendant agreed to the overall objective of the conspiracy or (2) that the defendant personally committed two predicate acts, thereby participating in a single objective conspiracy. *United States v. Starrett,* 55 F.3d, 1525, 1543 (11th Cir. 1995); *Church*, 955 F.2d at 693. In proving an agreement on an overall objective, the government can use circumstantial evidence to show "that 'each defendant must necessarily have known that the others were also conspiring to participate in the same enterprise through a pattern of racketeering activity.'" *United States v. Gonzalez,* 921 F.2d 1530, 1540 (11th Cir.) (quoting *United States v. Valera,* 845 F.2d 923, 929 (11th Cir. 1988)), *cert. denied,* 502 U.S. 860, 112 S.Ct. 178, 116 L.Ed.2d 140 (1991). "If the government proves an agreement on an overall objective, then it is 'not necessary that the defendant agree to personally commit two predicate acts.'" *Starrett,* 55 F.3d at 1544 (quoting *Gonzalez*, 921 F.2d at 1540).

[7, 8] In this case, the government presented sufficient evidence to support the finding that appellants agreed to corruptly utilize the Dade County Circuit Court system: in other words, that the appellants agreed to the overall objective of the enterprise with the knowledge that others were also conspiring to participate through a pattern of racketeering. The following evidence supports this conclusion with respect to Shenberg's conviction: Shenberg's participating with Gelber in Gelber's acceptance of kickbacks on court appointments; Shenberg's counseling of Gelber on how to conduct illegal transactions with Takiff; Shenberg's disclosure of the confidential informant's name; and Shenberg's holding, concealing, and disbursing of the proceeds derived from court

appointments and case fixing. Similarly, the following evidence supports the finding that Goodhart agreed to the overall objective of the conspiracy: Goodhart's agreement to act as a bag man for Sepe; Goodhart's arrangement with Sepe to fix the Carrillo case for Takiff; Goodhart's agreeing to arrange and arranging with Sepe to fix the Penna case; and Goodhart's attempt to bribe Morphonios. Moreover, our review of the record convinces us that a reasonable person could conclude beyond a reasonable doubt that each appellant committed or agreed to have others commit at least two predicate acts.

[9, 10] Goodhart next challenges the sufficiency of the evidence supporting his conviction contending that his six-month involvement at the end of the conspiracy does not constitute a sufficiently continuous RICO conspiracy pattern. To sustain a RICO conspiracy conviction based upon the commission of two predicate acts, the government must show that the predicate acts are related and amount to or pose a threat of continued criminal activity. *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 239, 109 S.Ct. 2893, 2900-01, 106 L.Ed.2d 195 (1989). In this case, Goodhart engaged in case fixing from the time he joined the enterprise until the end of the government's undercover investigation. Based on Goodhart's active involvement in fixing the Carrillo and Penna cases and the duration of his coconspirators' previous pattern of racketeering activity, we conclude that Goodhart's six-month involvement posed a threat of continued

criminal activity sufficient to support his RICO conspiracy conviction.[7] Accordingly, we affirm the appellants' convictions.

B. Denial of special verdict on RICO conspiracy count.

[11] We review the district court's denial of request for special verdict for abuse of discretion. *United States v. Dennis*, 786 F.2d 1029, 1041 (11th Cir. 1986), *cert. denied*, 481 U.S. 1037, 107 St.Ct. 1973, 95 L.Ed.2d 814 (1987).

At trial, appellants requested the district court to require the jury to return a special verdict on the RICO conspiracy count. The district court denied appellants' motion thereby requiring the jury to return a general verdict on the RICO conspiracy. Appellants argue that the use of the general verdict violated their Sixth Amendment right to a fair trial because it permitted the jury to disagree as to which two predicate acts each appellant committed or agreed to commit.[8]

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[7] Because we conclude that sufficient evidence supports the finding that Goodhart agreed to the overall objective of the enterprise, we do not address Goodhart's argument that racketeering act 10 involving the Carrillo case and act 11 involving the Penna case are multiplicitous.

[8] As previously stated, sufficient evidence supports the finding that appellants agreed to the overall objective of the RICO conspiracy, therefore the law in this circuit does not require the jury to also find that each appellant committed two predicate acts.

[12-14] As a preliminary matter, we recognize that the district court's use of a general verdict for a multi-object conspiracy, though disfavored, does not violate defendant's Sixth Amendment rights. *Griffin v. United States,* 502 U.S. 46, 47-48, 112 S.Ct. 466, 468, 116 L.Ed.2d 371 (1991). Nor does the district court's refusal to require a special verdict provide an independent basis for reversing an otherwise valid conviction. *Dennis*, 786 F.2d at 1039. In this case, the district court properly instructed the jury on the elements of a RICO conspiracy violation stating in pertinent part:

> The term pattern of racketeering activity requires at least two acts of racketeering, sometimes called predicate offenses or racketeering acts...
>
> ...[Y]ou must unanimously agree as to which two or more racketeering acts, that is, predicate offenses, if any, the defendant allegedly agreed to commit or would be committed.
>
> It would not be sufficient if some of the jurors should find that the Defendant agreed to commit two of the racketeering acts or agreed that two such acts would be committed while the remaining jurors found that he agreed to commit two different racketeering acts or agreed that two different such acts would be committed; you must all agree upon the same two racketeering acts in order to find the Defendant guilty of Count I.

We presume that a jury follows the court's instructions. *United States v. Stone,* 9 F.3d 934, 938 (11th Cir.1993), *cert. denied* -,

---- U.S. -----, 115 S.Ct. 111, 130 L.Ed.2d 58 (1994). Appellants presented no evidence that the jury failed to adhere to the district court's instructions. Accordingly, we hold that the district court acted within its discretion in denying appellants' request for a special verdict on the RICO conspiracy count.

C. Use of eleven-member jury

[15] Next, appellants contend that the district court abused its discretion when it failed to replace the pregnant juror after dismissing her for cause during deliberations. We review the district court's decision to continue deliberations with an eleven-member jury for abuse of discretion. *See* Fed.R.Crim.P. 23 (b).

Rule 23(b) of the Federal Rules of Criminal Procedure provides for a jury of less than twelve where "the court finds it necessary to excuse a juror for just cause after the jury has retired to consider its verdict." Fed.R.Crim.P. 23(b). In such cases, the remaining eleven jurors can return a valid verdict. Fed.R.Crim.P. 23(b). Prior to jury deliberations commencing, the district court decided not to dismiss a pregnant juror in her seventh month of pregnancy who wanted to continue her service on the jury and who had not experienced any difficulty during pregnancy. The jury deliberated over a month without incident until the pregnant juror went into labor on April 15.[9] After the juror went into labor, the

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[9] For the remainder of this discussion we will refer to the pregnant juror as "the juror."

court stayed jury deliberations until Monday, April 26 to allow the juror to give birth and continue jury duty. The juror's physician, however, would not authorize the juror's return for jury duty until May 13,. On April 26, the district court dismissed the juror for cause, finding that the two additional weeks would cause undue delay and instructed the remaining eleven jurors to continue deliberations.

[16] "The most substantial concern about substitution of an alternate juror after deliberations have begun is that the alternative might be coerced by jury members who might have already formulated positions or viewpoints or opinions." *United States v. Phillips,* 664 F.2d 971, 995-96 (5th Cir. Unit B 1981), *cert. denied,* 457 U.S. 1136, 102 S.Ct. 2965, 73 L.Ed.2d 1354 (1982). In spite of this concern we found such substitution proper in *Phillips*. In *Phillips*, we held that the district court properly replaced a juror with an alternate juror two days after jury deliberation commenced finding that the district court utilized sufficient safeguards to neutralize the possible prejudice to the defendants. *Phillips*, 664 F.2d at 996. The district court in *Phillips* questioned the remaining eleven jurors regarding their ability to "wipe" from their minds the previous two days of deliberations prior to placing the alternate juror on jury and directing the jury to begin "anew." *Phillips*, 664 F.2d at 991. Unlike *Phillips*, the jury int his case deliberated for a month prior to the dismissal of the juror. Because of the duration of jury deliberations in this case, we believe that a far greater risk of juror coercion existed. We also believe that the district court's ability to

implement safeguards sufficient to neutralize the potential prejudice to defendants is extremely limited under such circumstances. Accordingly, we conclude that the district court acted within its discretion in continuing deliberations with only eleven jurors and reject appellants' contention that the court erred in not replacing the juror prior to deliberations, noting that it would have been improper for the court to replace a juror for cause capable of serving.

D. Juror's discovery of cocaine-laced baggie

[17] During the middle of appellants' trial, a juror presented the court security officer with a trampled cocaine-laced baggie she found in the jury bathroom.[10] The district court, observing no indicating that any juror used drugs and noting that the discovery occurred following a five-day recess, did not disclose the discovery to the parties or question any of the jurors regarding the discovery. Appellants argue that the juror's presentation of the baggie constituted a communication to the court, and therefore, the district court's conduct violated Federal Rule of Criminal Procedure 43(a).[11]

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[10] After discovery of the baggie, the court security officer regularly performed cursory checks of the jury room and garbage for similar contraband. The court found no contraband any other time during the trial.

[11] Appellants learned of the juror's discovery from a newspaper article in the *Miami Herald*.

Rule 43(a) requires trial courts to disclose communications with jurors and provide the defendant with an opportunity to be heard prior to responding to the communication. *Rogers v. United States*, 422 U.S. 35, 39, 95 S.Ct. 2091, 2094, 45 L.Ed.2d 1 (1975). The juror's discovery in this case, however, did not constitute a communication within the meaning of rule 43(a) because the juror presented the baggie without comment on its effects on her ability to deliberate. Even assuming that the juror's presentation of the baggie constitute's a communication, the district court's actions at most establish harmless error because the district court did not respond to the jury's communication for fear that the appearance of any suspicion concerning the integrity of any juror would not serve the interest of justice. *See United States v. Rodriguez*, 765 F.2d 1546, 1553-54 (11th Cir.1985) (no error where the court failed to answer jury's question prior to verdict). Because we conclude that the district court did not abuse its discretion, we find it unnecessary to address appellants' other arguments regarding the juror's discovery.

E. Sentencing

[18] We review the sentencing court's findings of fact for clear error and its application of those facts to the Sentencing Guidelines *de novo*. *United States v. Rojas*, 47 F.3d 1078, 1080 (11th Cir.1995).

1. Shenberg

The jury convicted Shenberg of RICO conspiracy and extortion induced under the color of official right. In sentencing Shenberg, the district court applied section 2C1.2 of the Sentencing Guidelines finding Shenberg's criminal activity most analogous with the guidelines offenses involving public officials.[12] Prior to obtaining the base offense level under the 1989 Sentencing Guidelines, the district court determined that the underlying racketeering activity of the RICO conspiracy conviction constituted two distinct criminal violations: (1) soliciting or receiving bribes and extortion under the color of official right and (2) aiding and abetting a conspiracy to commit murder.[13] Consequently, the district court classified Shenberg's RICO conspiracy and extortion conviction into the following three criminal violation groups - "conspiracy to solicit or receive bribes," "conspiracy to commit

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[12] Section 2E1.1 of the United States Sentencing Guidelines sets the base offense level of 19 for a defendant convicted of RICO conspiracy unless the offense level applicable to the underlying racketeering activity is greater. U.S.S.G. §2E1.1. Section 1B1.2(d) provides that "[a] conviction on a count charging a conspiracy to commit more than one offense shall be treated as if the defendant had been convicted on a separate count of conspiracy for each offense that the defendant conspired to commit." U.S.S.G. § 1b1.2(D). This mistake, however, does not affect the calculation of Shenberg's sentence because section 2E1.1, like section 1B1.2(d), allows cross-referencing under section 2C1.1.

[13] The district court classified the underlying racketeering activity into separate violations pursuant to U.S.S.G. § 1B1.2(d).

murder," and "extortion."[14] The court subsequently assigned Shenberg a base offense level of 20 for the "conspiracy to commit murder" violation group because if carried the highest base level offense of the three groups.

In obtaining the base level offense of the "conspiracy to commit murder" violation group, the court applied section 2C1.1(c)(1), the cross referencing provision, and borrowed the applicable guidelines for a conviction for conspiracy to commit murder.[15] *See* U.S.S.G. § 2A2.1. The district court then added 4 two-point enhancements for "more than minimal planning: pursuant to section 2A2.1(b)(1), financial motivation pursuant to section 2A2.1(b)(1), financial motivation pursuant to section 2A2.1(b)(4), abuse of a position of public trust pursuant to section 3B1.1, increasing Shenberg's offense level to 28. Next, the district court added a one-point multi-count adjustment to the offense level, pursuant to section 3A1.1, increasing Shenberg's offense level of

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[14] The presentence investigation report (PSI) separately calculated Shenberg's offense level for the "conspiracy to solicit or receive bribes" and the "extortion" violation groups. Because the district court did not sentence Shenberg according to either of these calculations, we do not address Shenberg's contention that the probation officer improperly scored these violations groups under the Sentencing Guidelines.

[15] Section 2C1.1(c)(1) provides that "[i]f the bribe was for the purpose of concealing or facilitating another criminal offense," cross reference, U.S.S.G. § 2C1.1(c)(1)(1989).

29.[16] The district court, finding that the combined offense level did not adequately reflect the systematic and pervasive corruption of Dade County judiciary and loss of public confidence in government, departed upward 5 levels, from 29 to 34, pursuant to section 5K2.0. *See* U.S.S.G. § 5K2.0.

Shenberg challenges the calculation of his sentence on several grounds. First, Shenberg contends that the district court's application of the conspiracy to commit murder guideline constitutes an improper use of section 2C1.1(c)(1). Second, Shenberg contends that the district court erred in applying the vulnerable victim and "more than minimal planning" enhancement not his offense level.[17]

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[16] For purposes of U.S.S.G. § 3D1.4, the court combined the "conspiracy to commit murder" and the "extortion" violation groups and assigned it one point. The court assigned the "conspiracy to solicit or receive bribes" violation group one-half point. The combined score required an increase of one level.

[17] Shenberg also contends that the district court improperly applied a two-point enhancement for more than one bribe under 2C1.1(b)(1) and financial motivation under Section 2A2.1(b)(4). In addition, Shenberg contends that the district court improperly added a one point adjustment to his offense level for more than one "group" under section 3D1.4. After reviewing the record, we find that these arguments lack merit and therefore do not warrant discussion.

Finally, Shenberg contends that the district court failed to find sufficient aggravating circumstances to warrant a 5 level upward departure.

[19] We first address the district court's application of section 2C1.1(c)(1). Section 2C1.1(c)(1) authorizes the court to cross reference sentencing guidelines where "the bribe [paid] was for the purpose of concealing or facilitating another criminal offense." U.S.S.G. § 2c1.1(C)(1) (1989). The district court, adopting the factual findings in the PSI, found that Shenberg disclosed the confidential informant's name for payment with the knowledge that Peter intended to murder the informant and that Shenberg participated in the planning of the murder in requiring that murder not occur for at least forty-five days.[18] Based on this finding the district utilized section 2C1.1(c)(1) (1989). Shenberg argues that the application of the cross referencing provision in this case impermissibly over-represents the severity of the underlying crime and "artificially" inflates the guidelines range. We disagree.

[20] According to the language in the Sentencing Guidelines, Shenberg's disclosure of the confidential informant's name is tantamount to conspiracy to commit murder because Shenberg released the name for payment with the understanding that it would facilitate the informant's murder. We give the

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[18] As set forth in the facts section of this opinion, Peter and the confidential informant are both fictitious persons the government created for purpose of its undercover sting operation.

Sentencing Guidelines their plain meaning effect, "except in the most extraordinary situation where the language leads to an absurd result contrary to clear legislative intent." *United States v. Pompey*, 17 F.3d 351, 354 (11th Cir. 1994) (citations omitted). Because no absurd result occurred in this case, we affirm the district court's application of section 2C1.1(c)(1).

[21] Next, Shenberg argues that the court improperly applied the "vulnerable victim" enhancement because the alleged murder conspiracy involved a fictitious confidential informant. Section 3A1.1 provides for a two-point enhancement "[i]f the defendant knew or should have known that a victim of the offense was unusually vulnerable. . .or otherwise particularly susceptible to criminal conduct." Shenberg urges this court to hold that the district court improperly applied the "vulnerable victim" enhancement solely because the victim in this case is a fictitious one. We cannot so hold in light of existing law in this circuit. This circuit has repeatedly recognized that the "vulnerable victim" enhancement solely because the victim in this case is a fictitious one. We cannot so hold in light of existing law in this circuit. This circuit has repeatedly recognized that the "vulnerable victim" enhancement " 'focuses chiefly on the conduct of the defendant' and should be applied only where 'the defendant selects the victim' due to the victim's perceived vulnerability to the offense." *United Stated v. Page*, 69 F.3d 482, 488 (11th Cir. 1995) (quoting *United States v. Long*, 935 F.2d 1207, 1210 (11th Cir. 1991)) (emphasis in original). "It is the perpetrator's perception, not actual vulnerability, that triggers enhancement." *United States v. Davis*,

967 F.2d 516, 523 n. 8 (11th Cir. 1992), *rev'd on other grounds*, 30 F.3d 108 (11th Cir. 1994) (government agent posing as extortion victim did not affect the "vulnerable victim" analysis because the defendant did not know of victim's affiliation with the government). Adhering to this line of reasoning, we conclude that the district court properly applied the "vulnerable victim" enhancement in this case. Shenberg knew that the state requested that the name of the informant remain under seal to protect the informant from retaliation from Peter. Shenberg also knew that Peter intended to murder the informant. Nevertheless, Shenberg disclosed the informant's name in exchange for payment. Shenberg should not derive a benefit for purposes of sentencing merely because the informant Shenberg believed Peter would murder did not exist. We therefore hold that the district court properly applied the "vulnerable victim" enhancement pursuant to section 3A1.1.

[22] The district court, however, erred in applying the two-point enhancement for "more than minimal planning." Section 2A2.1(b)(1) under the 1989 Sentencing guidelines requires an actual assault. *See U.S.S.G.* § 2A2.1(b)(1) (1989). Because an assault on a fictitious person is impossible, the "more than minimal planing" enhancement cannot apply to Shenberg's sentence.

[23] Finally, Shenberg contends that the district court improperly departed upward five levels based upon the court's finding that Shenberg's conduct was part of a systematic corruption of a governmental function causing loss of public confidence in government. When reviewing whether the district court properly

departed from the Sentencing Guidelines, we employ a three-part test. *United States v. Weaver,* 920 F.2d 1570, 1572 (11th Cir. 1991). First, we determine whether the Sentencing Commission adequately considered the particular factors the district court relied on for the basis of its departure. *United States v. Godfrey,* 22 F.3d 1048, 1053 (11th Cir. 1994). Second, assuming that the Sentencing Commission did not adequately consider the factors, we determine whether the district court's reliance on those factors furthers the objectives of the guidelines. *Godfrey,* 22 F.3d at 1053. And, finally, if those factors further the objectives of the guidelines, we determine the reasonableness of the district court's departure. *See United States v. Alpert,* 28 F.3d 1104, 1108 (11th Cir. 1994).

[24] In this case, the district court found that Shenberg's conduct caused "an undermining of the system of justice in [Dade] County and in this country." Thus, in order to satisfy the first inquiry, we apply *de novo* review and look to the language of the Sentencing Guidelines to see if the Sentencing Commission adequately considered systematic corruption. Section 2C1.1's commentary specifically states, "[w]here the court finds that the defendant's conduct was part of a systematic or pervasive corruption of a government function, process, or office that may cause loss of public confidence in government, an upward departure *may be warranted.*" § 2C1.1, comment. (n.5) (1989) (emphasis added). This language clearly indicates that the Sentencing Commission did not adequately account for systematic corruption resulting in loss of public confidence in government. We note that commentary that interprets or explains a guideline is authoritative

unless it violates the Constitution or a federal statute or is inconsistent with or a plainly erroneous reading of the guideline. *See Stinson v. United States,* 508 U.S. 36, 41-46, 113 S. Ct. 1913, 1917-19, 123 L.Ed.2d 598 (1993).

Finding that the Sentencing Commission failed to adequately consider systematic corruption, we now determine whether the district court's reliance on the systematic corruption of the Circuit Court of Dade County furthers the objectives of the guidelines. An "[u]pward departure from the guidelines range is permitted only when *aggravating circumstances* exist that were not adequately considered by the Sentencing Commission when it developed the guidelines." *Alpert,* 28 F.3d at 1108 (citing 18 U.S.C. § 3553(b)) (emphasis added). The district court found that Shenberg's conduct caused the loss of public confidence in government in Dade County and throughout the United States. This degree of loss of public confidence clearly qualifies as an aggravating circumstance. The government, however, presented no proof of local community sentiments concerning Shenberg's conduct or proof of loss of public confidence in the government. Consequently, Shenberg argues that the departure fails this prong of the test. We disagree.

[25, 26] For purposes of the guidelines, the government must prove the facts, "used" in sentencing by a preponderance of the evidence. *See United States v. Cornog,* 945 F.2d 1504, 1514 (11th Cir. 1991). In this case, the government overwhelmingly proved systematic corruption by a preponderance of the evidence. The guidelines do not require a showing of actual

public harm. The commentary to section 2C1.1 only requires the court to find that the corruption "may" cause loss of public confidence in the government. Whether the systematic corruption of the circuit court caused actual loss of public confidence in government, of course, is not subject to reasonable dispute. Therefore, the district court can properly take judicial notice of public reaction to this case and consider it in making its decision to depart from the Sentencing Guidelines. *See* Fed.R.Evid. 201. Moreover, the government's submission requesting an upward departure from the guideline range gave Shenberg reasonable notice that the district court was contemplating an upward departure. The district court also gave Shenberg an opportunity to comment before it departed from the sentencing range. Accordingly, we do not find such judicial notice improper.

[27, 28] In the alternative, Shenberg argues the district courts's application of the 2-point enhancement for abuse of position of trust under section 3B1.3 adequately accounts for the alleged harm to the public, and therefore asserts that the departure constitutes double counting. We also reject this argument. "District courts may not enhance a sentence on the basis of the same incidents that they used to determine the base level for sentencing." *United States v. Ledesma*, 979 F.2d 816, 820 (11th Cir. 1992). The district court in this case, however, did not base its decision to depart on the same considerations that motivated its application of the abuse of position of trust enhancement. In applying the abuse of position of trust enhancement, the district court only considered Shenberg's conduct with respect to his

position as an elected official of Dade County, and not on the basis of systematic corruption.[19] Consequently, no double counting occurred in sentencing Shenberg. We therefore find that a departure based on systematic corruption and massive loss of public confidence furthers the objectives of the guidelines.

Finally, we review the district court's departure for reasonableness. The district court calculated Shenberg's total offense level at 29. The appropriate sentencing guideline range with a criminal history of category I is 87-108 months imprisonment. The district court departed from this guideline range giving Shenberg an offense level of 34 which carries a sentence range of 151-188 months. The court sentenced Shenberg to 188 months imprisonment. We find that the district court reasonably departed from the Sentencing Guidelines range. Accordingly, we affirm Shenberg's sentence on all respects, with the exception of the district court's application of the 2 point enhancement for "more than minimal planning."

2. Goodhart

The district court in sentencing Goodhart also applied the cross-referencing provision in section 2C1.1 and sentenced Goodhart as an accessory after the fact to drug trafficking under

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[19] Section 3B1.3 provides, "[i]f the defendant abused a position of public or private trust . . . in a manner that significantly facilitated the commission or the concealment of the offense, increase by 2 levels." U.S.S.G. § 3B1.3

section 2X3.1 because his underlying racketeering activity involved fixing a case in which the state had allegedly seized twelve kilograms of cocaine.[20] This application of the Sentencing Guidelines resulted in an offense level of 26 instead of RICO violation base offense level of 19. The district court then added a two-point enhancement under section 3B1.3 for use of a special skill, giving Goodhart a total offense level of 28.

[29, 30] Goodhart contends that the two-point enhancement for use of special skill under section 3B1.3 constituted an improper and erroneous application of the Sentencing Guidelines.[21] Goodhart argues that his status as an attorney did not facilitate the commission of the RICO conspiracy because his duties as a "bag man" did not depend on his status as an attorney. We review sentence enhancements based on special skill for clear error. *See United States v. Malgoza,* 2F.3d 1107, 1109 (11th Cir.1993). The district court found that Goodhart, as a part of the

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[20] The district court based its sentencing determination on Goodhart's involvement with the Carrillo matter. As set forth in the facts section of this opinion, the government filed fictitious drug trafficking charges against Peter's sister-in-law Bonnie Carrillo.

[21] Goodhart also contends that the district court erred in applying section 2C1.1(c)(2) cross-referencing provision and section 2X3.1 in sentencing him as an accessory after the fact to drug trafficking because his racketeering activity involved a fictitious case. We summarily affirm the district court's use of section 2C1.1(c)(2)'s cross referencing provision for the reasons set forth in our discussion of Shenberg's sentence.

RICO conspiracy involving case-fixing, read arrest affidavits, reviewed pleadings, proposed suppression orders, and made suggestions based upon his experience and education as to the amount of bond, the booking procedure, and the possibility of an appeal of Sepe's suppression order, all in an effort to avoid raising "red flags." The record supports this finding; therefore, we find no clear error. We therefore conclude that the district court properly applied the special skill enhancement.

F. Cross appeal

1. Sentencing Shenberg under the 1989 Sentencing Guidelines

[31] On cross-appeal, the government contends that the district court improperly sentenced Shenberg under the 1989 Sentencing Guidelines and argues that the district court should resentence Shenberg under the 1990 Sentencing Guidelines. At trial the government sought to prove that Shenberg, after refusing to deal with Takiff in July 1990, continued to advise Gelber and Sepe regarding their illegal activity and continued to hold the illegal proceeds for Gelber in his possession after November 1, 1990, the effective date of the 1990 Sentencing Guidelines. At Shenberg's sentencing hearing, the district court, however, found that Shenberg's participation in the conspiracy ended in July 1990. As previously stated, we review the district court's factual findings for purposes of the Sentencing Guidelines for clear error. Because

factual support exists to justify the court's finding, we find no clear error.

### 2. Application of collateral estoppel in retrial of mistried counts

[32] Also on cross-appeal, the government challenges the district court's July 15, 1993 order. The district court in this order held that direct estoppel barred the government from using acquitted counts as predicate acts in the substantive RICO could during the retrial of cross-appellees Shenberg and Sepe on the mistried counts.[22] The district court also held that collateral estoppel barred the government from proving the existence of a RICO conspiracy agreement with the evidence the government used to support the acquitted counts. We review questions of law *de novo*. *United States v. Terry*, 60 F.3d 1541, 1543 (11th Cir. 1995).

#### a. Substantive RICO count

[33, 34] It is well settled that the Double Jeopardy Clause of the Fifth Amendment does not apply in the context of a retrial of mistried counts. *Richardson v. United States*, 468 U.S.

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[22] Since the filing of this cross-appeal, the government has moved to dismiss its appeal against Goodhart and Shenberg on this issue. We previously granted the motion to dismiss with respect to Goodhart and carried the motion with the case as to Shenberg. In light of our decision today, we deny the motion to dismiss the cross-appeal against Shenberg as moot.

317, 323, 104 S.Ct. 3081, 3084-85. Although double jeopardy does not bar the government from reprosecuting defendants on mistried counts, estoppel principles may nevertheless apply to preclude the government from relitigating certain issues on retrial. *See Ashe v. Swenson*, 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970); *United States v. Brown*, 983 F.2d 201, 202 (11th Cir. 1993). In criminal cases, courts generally refer to the estoppel principles as collateral estoppel. In the context of a retrial, however, the term "collateral estoppel" is a misnomer because a "retrial cannot be 'collateral' if it is a 'continuation of the first trial." *United States v. Bailin*, 977 F.2d 270, 276 (7th Cir. 1992). For this reason, the term "direct estoppel" more appropriately characterizes the application of estoppel principles in the context of a retrial. *See Bailin*, 977 F.2d at 276. Our analysis, however, remains the same, whether we refer to the application of estoppel principles as "direct" or "collateral." *Bailin*, 977 F.2d at 280 n. 15. To avoid confusion, we will therefore refer to the estoppel principles collectively as collateral estoppel for purposes of this discussion.

[35] In *Ashe*, the Court recognized that the Double Jeopardy Clause incorporates the doctrine of collateral estoppel. *Ashe*, 397 U.S. at 443, 90 S.Ct. at 1194. Based on this acknowledgement, the government argues that the incorporation of the collateral estoppel doctrine in Double Jeopardy Clause limits the application of collateral estoppel to circumstances where only double jeopardy applies. Although this court has not squarely

addressed this question, the Seventh Circuit in *Bailin* rejected the government's argument, stating:

> The government's argument assumes that because collateral estoppel is "embodied" in the Double Jeopardy Clause, collateral estoppel is co-extensive with the Double Jeopardy Clause's other protections. Thus, the government asks us to hold that collateral estoppel can never apply in circumstances where double jeopardy does not. Such a holding would eliminate collateral estoppel from criminal cases and overrule *Ashe*. A criminal defendant has no need for the benefits of issue preclusion if his entire prosecution, then a court need not consider whether particular issues are precluded from relitigation.

*Bailin*, 977 F.2d at 275. We agree with the Seventh Circuit and hold that the Double Jeopardy Clause does not limited the application of collateral estoppel to only cases in which double jeopardy applies.

[36-38] The doctrine of collateral estoppel applies "when an issue of ultimate fact has once been determined by a valid and final judgment." *Ashe*, 397 U.S. at 443, 90 S.Ct. at 1194. In such instances, the same parties cannot relitigate the ultimate issue in any future lawsuit. *Ashe*, 397 U.S. at 443, 90 St.Ct. at 1194. When determining whether collateral estoppel applies in the context of a retrial, *Ashe* requires courts to engage in a two-part inquiry. *See Brown*, 983 F.2d at 202. First, courts must examine the verdict and the record to see "what facts," if any, were necessarily determined in the acquittal at the first trial. *Brown*, 983

F.2d at 202. Second, the court must determine whether the previously determined facts constituted "an essential element" of the mistried count. *Brown*, 983 F.2d at 202. Applying *Ashe's* two-part test, the district court correctly noted that most of the crimes Sepe and Shenberg were charged with mirrored predicate acts listed in the substantive RICO count. Based on this finding, the district court concluded that the acquitted counts necessitated the finding that the jury also decided the predicate acts which mirrored the acquitted counts in Sepe and Shenberg's favor in the first trial Consequently, the district court held that collateral estoppel precluded the government from listing these predicate acts as "essential elements" of the substantive RICO count. We find no error with the district court's application of collateral estoppel to the substantive RICO count. Accordingly, we affirm the district court's order barring the government form using acquitted counts as predicate acts in the substantive RICO count.

b. RICO conspiracy count

[39, 40] In the alternative, the government argues that even if collateral estoppel applies to bar the use of acquitted counts as predicate acts in the substantive RICO count, it does not preclude the government from introducing the evidence it offered to support the acquitted counts as predicate acts in the RICO conspiracy count. We agree. Like the substantive RICO count, the acquitted counts do not necessitate the finding that the issue of ultimate fact, i.e. agreement to commit two ore more predicate acts or agreement to the overall objective of the enterprise, was

necessarily determined. This is because the actual commission of the underlying crime does not constitute "an essential element" of RICO conspiracy. *United States v. Eley*, 968 F.2d 1143, 1146 (11th Cir. 1992).

The Supreme Court's holding in *United States v. Felix*, 508 U.S. 378, 380, 112 S.Ct. 1377, 1379-80, 118 L.Ed.2d 25 (1992), further supports this conclusion. In *Felix*, the Court allowed the government in its conspiracy prosecution to rely upon overt acts based upon substantive offenses for which the defendant had been convicted holding that the "prosecution of a defendant for conspiracy, where certain of the overt acts relied upon by the Government are based on substantive offenses for which the [issues have] been previously [decided], does not violate the Double Jeopardy Clause." *Felix*, 503 U.S. at 380, 112 S.Ct. at 1379-80. In that case, a jury in the Eastern District of Oklahoma convicted the defendant on a multi-count indictment for conspiracy, manufacture and possession with intent to distribute methamphetamine, maintaining place for manufacturing methamphetamine, and possession of precursor chemicals. Prior to that trial, a jury in the Western District of Missouri convicted the defendant on a single count of attempting to manufacture methamphetamine. On appeal, the defendant argued that the Double Jeopardy Clause barred the second prosecution because the government based its case on proof of the same conduct, actors and time frames as the prosecution in Missouri. The Tenth Circuit reversed the defendant's conviction on most of the counts holding that the Double Jeopardy Clause barred successive prosecution of

the defendant where the government based its charges on evidence introduced at the previous trial. The Court reversed the Tenth Circuit holding that "mere overlap in proof between two prosecutions does not establish a double jeopardy violation." *Felix* , 503 U.S. at 386, 112 S.Ct. at 1382. The court noted that is holding in *Felix* adhered to "the basis, yet important, principle that the introduction of relevant evidence of particular misconduct in a case is not the same thing as prosecution for that conduct." *Felix*, 503 U.S. at 387, 112 S.Ct. at 1383.

In this case, the district court recognized that "[c]onspiracy to commit a crime is separate and distinct from the underlying crime, and [that] an acquittal as to one charge does not affect the verdict as to the other." The district court, however, erroneously concluded that the doctrine of collateral estoppel barred the government from proving a RICO conspiracy agreement with predicate acts mirroring the acquitted substantive counts. In reaching its conclusion, the district court applied this circuit's holding in *United States v. Gornto*, 792 F.2d 1028 (11th Cir. 1986). In *Gornto*, we held that in the context of a retrial the doctrine of collateral estoppel barred the government from proving mistried conspiracy counts with evidence of substantive offenses the jury acquitted the defendant of in the first trial. *Gornto*, 792 F.2d at 1031. The *Gornto* court reasoned that to hold otherwise would not provide a sufficient shield against the threat of double jeopardy. *Gornto*, 792 F.2d at 1031. Since our decision in *Gornto*, the Supreme Court has rejected this line of reasoning holding that the doctrine of collateral estoppel does not preclude the government

form introducing relevant and probative evidence that is otherwise admissible under the Federal Rules of Evidence. *See Dowling v. United States,* 493 U.S. 342, 348-49, 110 S.Ct. 668, 672-73, 107 L.Ed.2d 708 (1990).[23] Consequently, we turn our attention back to the Court's decision in *Felix.*

In the context of RICO conspiracy, the overt acts the Court speaks of in *Felix* constitute predicate acts. As the Court in *Felix* allowed the government to rely upon overt acts based upon substantive offenses for which the defendant had been previously

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[23] In *Dowling,* the district court permitted the government to introduce evidence of a prior robbery of which the defendant had been acquitted to prove identity of the bank robber in the instant case pursuant to Federal Rules of Evidence 404(b). The defendant on appeal argued that his prior acquittal precluded the government from introducing evidence which supported the charges in the acquitted case during his trial on unrelated bank robbery charges. The Supreme Court disagreed and declined to extend "the collateral estoppel component of the Double Jeopardy Clause to exclude in all circumstances. . . relevant and probative evidence that is otherwise admissible under the rules of evidence simply because it relates to alleged criminal conduct for which a defendant has been acquitted." *Dowling,* 493 U.S. at 348, 110 S.Ct. at 672. Based on the Court's holding in *Dowling,* we conclude that *Gornto* no longer constitutes good law to the extent it holds that the doctrine of collateral estoppel bars the government from introducing the underlying evidence of acquitted substantive counts in the retrial of the mistried conspiracy count. *See United States v. Machado,* 804 F.2d 1537, 1543 (11th Cir. 1986) holding that only intervening law from the Supreme Court or this court sitting *en banc* can overrule a prior panel decision).

convicted, it follows that we must also allow the government to rely upon the predicate acts mirroring the substantive counts the jury previously decided in the retrial of the RICO conspiracy count. Although, the Court reached its decision in *Felix* based upon the Double Jeopardy Clause and not the doctrine of collateral estoppel, the result in this case remains the same because the Double Jeopardy Clause incorporates the doctrine of collateral estoppel. *Ashe*, 397 U.S. at 443, 90 S.Ct. at 1194. We therefore hold that the doctrine of collateral estoppel does not bar the government from using predicate acts that mirror acquitted substantive offenses to prove RICO conspiracy.

## CONCLUSION

For the foregoing reasons, we affirm Shenberg's and Goodhart's convictions and Goodhart's sentence. We, however, reverse Shenberg's sentence and remand for resentencing consistent with this opinion. The district court's order barring the government from using acquitted counts as predicate acts in the substantive RICO counts is affirmed. We otherwise reverse the portion of the district court's order barring the government from proving the RICO conspiracy and other hung counts with the evidence the government used to support the acquitted counts.

CONVICTIONS AFFIRMED AND RESENTENCING ORDERED.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Case No. 93-4798

United States of America,

Plaintiff-Appellee,
Cross-Appellant,

v.

Harvey N. Shenberg,

Defendant-Appellant,
Cross-Appellee,

David Goodhart,

Defendant-Appellant.

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No. 93-4906

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United States of America,

Plaintiff-Appellant,

v.

Harvey N. Shenberg, Alfonso C. Sepe,

Defendants-Appellees.

On Appeal from the United States District Court

for the Southern District of Florida

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC
(Opinion_____, 11th Cir., 19___, _____F.2d_____).

Before: HATCHETT and BARKETT, Circuit Judges, and GODBOLD, Senior Circuit Judge

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

_____
UNITED STATES CIRCUIT JUDGE
Filed 9/25/96

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Case No. 93-4798
D.C. Docket No. 91-708-CR

United States of America,

Plaintiff-Appellee-Cross-Appellant,

v.

Harvey N. Shenberg,

Defendant-Appellant-Cross-Appellee,

David Goodhart,

Defendant-Appellant.

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No. 93-4906
D.C. Docket No. 91-708-CR

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United States of America,

Plaintiff-Appellant,

v.

Harvey N. Shenberg, Alfonso C. Sepe,

Defendants-Appellees.

Appeals from the United States District Court
for the Southern District of Florida

Before HATCHETT and BARKETT, Circuit Judges, and GODBOLD, Senior Circuit Judge.

JUDGMENT

These causes came to be heard on the transcript of the record form the United States District Court for the Southern District of Florida, and were argued by counsel;

UPON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the order of the District Court barring the government from using acquitted counts as predicate acts in the substantive RICO counts is hereby AFFIRMED; the portion of the District Court's order barring the government form proving the RICO conspiracy and other hung counts with the evidence the government used to support the acquitted counts is hereby reversed; the judgments of convictions of the said District Court in these causes be and the same are hereby AFFIRMED; the sentence imposed by the said District court

as to Goodhart in these causes be and the same is hereby AFFIRMED; the sentence imposed as to Shenberg in these causes be and the same is hereby REVERSED; and that these causes be and the same are hereby REMANDED to said District Court for resentencing of Shenberg in accordance with the opinion of this Court.

Entered:

July 12, 1996

For the Court: Miguel J. Cortez, Clerk

By:_____

Deputy Clerk

ISSUED AS MANDATE: 10/17/96

Supreme Court, U.S.
FILED
APR 2 1997
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(2)

No. 96-1009

# In the Supreme Court of the United States

OCTOBER TERM, 1996

DAVID GOODHART AND HARVEY SHENBERG,
PETITIONERS

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT*

## BRIEF FOR THE UNITED STATES

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19 pp

## QUESTIONS PRESENTED

1. Whether, at petitioners' trial for RICO conspiracy, the district court's jury instructions failed to ensure that the jury verdict was unanimous.

2. Whether a RICO conspiracy charge requires proof that the defendant agreed to commit personally at least two predicate acts of racketeering.

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## BRIEF FOR THE UNITED STATES

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### OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A58) is reported at 89 F.3d 1461.

### JURISDICTION

The judgment of the court of appeals (Pet. App. B3-B5) was entered on July 12, 1996. A petition for rehearing was denied on September 25, 1996. Pet. App. B1-B2. The petition for a writ of certiorari was filed on December 23, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

After a jury trial in the United States District Court for the Southern District of Florida, each petitioner was convicted on one count of conspiring to conduct and participate in the conduct of the affairs of an enterprise through a pattern of racketeering activity, in violation of 18 U.S.C. 1962(d). Petitioner Shenberg was also convicted of attempted extortion, in violation of 18 U.S.C. 1951. Shenberg was sentenced to 188 months' imprisonment, to be followed by a three-year term of supervised release. Petitioner Goodhart was sentenced to 97 months' imprisonment, to be followed by a three-year term of supervised release. The court of appeals affirmed the convictions but vacated Shenberg's sentence and remanded for resentencing. Pet. App. A1-A58.

1. The evidence at trial showed that Roy T. Gelber, a judge of the Circuit Court of the Eleventh Judicial Circuit of Florida, accepted kickbacks in return for appointing attorneys as special assistant public defenders. Petitioner Shenberg, a judge on the county court, advised Gelber about the acceptance of kickbacks and other illegal schemes. Shenberg also arranged for Gelber to add one of Shenberg's former law partners to the list of attorneys who received court appointments in exchange for kickbacks. Thereafter, Shenberg periodically gave Gelber money on behalf of his former partner. Pet. App. A16-A17.

After learning of the kickback scheme, the government employed Raymond Takiff, a lawyer and friend of Gelber, to work undercover and to record conversations with Gelber and others suspected of corruption. In August 1989, Takiff, posing as a corrupt lawyer with ties to a fictitious South American drug

trafficker named "Peter," requested Gelber's assistance in influencing criminal cases pending against Peter's employees. Gelber accepted $11,000 from Takiff and gave Shenberg $5,000 to place in Shenberg's home safe. At Takiff's request, Gelber and Shenberg investigated the court file of one of Peter's employees to determine if he had cooperated with authorities in exchange for the dismissal of an attempted murder charge against him. Pet. App. A17-A18.

After the police seized property from the hotel room of one of Peter's employees, Takiff told Gelber that he wanted the property returned and information on the identity of the confidential informant. Gelber initially told Takiff that he could not assist him because he had sealed the warrant affidavit. Later, however, Gelber agreed to hear Takiff's motion to return property and to unseal the affidavit in anticipation of receiving a portion of the seized property as payment for granting the motion. Shenberg told Gelber he did not believe that the matter would raise any "red flags." Gelber then met with Takiff, intending to disclose the name of the informant, but changed his mind when he learned that Peter planned to have the informant killed. Shenberg subsequently disclosed the name of the informant to Takiff on the conditions that Peter not murder the informant for 45 days, that Peter pay Shenberg $50,000, and that Gelber receive a portion of the seized property. Shenberg eventually grew suspicious that Takiff was an informant and told Gelber that he would not resume his dealings with Takiff. Pet. App. A19-A21.

In September 1990, Circuit Judge Phillip Davis told Takiff that he, Gelber, and Shenberg intended to join up with Takiff to "make some money." Takiff

provided Davis with the names of four individuals and asked him to determine if there were outstanding warrants against them. After Davis informed Takiff that there were outstanding warrants against two of the individuals, Takiff asked Gelber to fix the warrants, one of which related to a case before Circuit Judge Arthur Snyder. Gelber conferred with Shenberg, who advised him that Circuit Judge Alfonso C. Sepe should approach Snyder on Takiff's behalf. Snyder refused to fix the warrant. Pet. App. A21.

In December 1990, Takiff asked Gelber to obtain low bail in a fictitious case filed by the state prosecutors against Peter's sister-in-law, Bonnie Carrillo, and her husband, Hector Penna, and dismissal of the charges through a motion to suppress. Shenberg cautioned Gelber about dealing with Takiff. Gelber nonetheless conferred with Sepe, who stated that he would have no problem complying with Takiff's request. The deal called for Sepe and Gelber to receive $200,000 for each defendant. After the deal was aborted, Sepe agreed to resume negotiations with Takiff on condition that petitioner Goodhart, a lawyer, receive the bribery payment. Thereafter, Takiff conducted all his dealings with the judges through Goodhart. Pet. App. A22-A23.

In February 1991, Takiff gave Goodhart $150,000 in cash. The following day, over the State's objection, Sepe released Carrillo on $50,000 bail. In April 1991, Sepe also granted Carrillo's motion to suppress, leading to the dismissal of the charges against her. In addition, Sepe agreed to find grounds to dismiss the indictment against Carrillo's husband, who also faced drug trafficking charges. A few weeks later, Sepe gave Gelber $50,000 in cash, $10,000 of which Gelber gave to Shenberg to place in Shenberg's safe. In May

1991, Goodhart unsuccessfully attempted to fix another case for Takiff. Pet. App. A23-A24.

On June 8, 1991, the government executed search warrants at the homes and offices of Gelber, Shenberg, Sepe, Goodhart, and Davis. They seized money matching the serial numbers of bribes paid to Gelber, Sepe, Shenberg, and Goodhart. Pet. App. A24.

2. The grand jury charged petitioners with one count of conducting the affairs of an enterprise through a pattern of racketeering activity, in violation of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1962(c), and one count of conspiracy to violate the RICO Act, in violation of 18 U.S.C. 1962(d). The substantive racketeering count alleged that the defendants had conducted an enterprise through a pattern of racketeering consisting of 13 separate predicate acts of racketeering, and set forth those 13 predicate acts. Superseding Indictment 24-53. The substantive count also alleged that each of the 13 acts of racketeering were criminal offenses under several different theories, or subpredicate acts. *Ibid.* The RICO conspiracy count did not expressly incorporate the predicate acts and subpredicate acts listed in the RICO substantive count. Rather, the conspiracy count alleged that the conspirators agreed to engage in a pattern of racketeering activity consisting of multiple enumerated criminal offenses, alleged that the objective of the conspiracy was to use the circuit court corruptly to make money, and set forth numerous methods and means that the defendants anticipated employing to achieve the conspiracy's goal. *Id.* at 4-24.

3. At the conclusion of the trial, the defense requested a special verdict on the RICO counts requiring the jury to identify the specific predicate acts of

racketeering that each defendant committed. The district court granted the request for a special verdict on the substantive RICO count, but denied the request for the RICO conspiracy count. Pet. App. A26. In its final charge, the district court instructed the jury with respect to the RICO conspiracy count that, in order to find petitioners guilty, the jury was required to find (among other things) that petitioners agreed *either* to "personally participate in the commission of two predicate offenses," *or* that "other members of the conspiracy would commit two or more predicate offenses." 67 Tr. 11,965. The court further instructed the jury that, on the conspiracy count, it "must unanimously agree as to which two or more racketeering acts, that is, predicate offenses, if any, the defendant allegedly agreed to commit or would be committed." Pet. App. A34. The court added: "It would not be sufficient if some of the jurors found that the Defendant agreed to commit two of the racketeering acts or agreed that two such acts would be committed while the remaining jurors found that he agreed to commit two different racketeering acts or agreed that two different such acts would be committed." *Ibid.*

The jury returned verdicts of not guilty on several substantive counts and failed to reach a verdict on others, including the substantive RICO violation charged against both petitioners. The jury found both petitioners guilty of RICO conspiracy. Pet. App. A26.

4. On appeal, petitioners contended that the evidence was insufficient to support their convictions on the RICO conspiracy count because it fell short of showing that they agreed *either* personally to commit two predicate acts of racketeering *or* to have others commit two or more such acts. Shenberg C.A.

Br. 15; Goodhart C.A. Br. 39. Petitioners argued that, setting aside the predicate acts that corresponded to substantive counts on which they or their co-defendants were acquitted or on which the jury had failed to reach agreement, they were each subject to liability for only one predicate act. They did not, however, argue to the court of appeals that a RICO conspiracy charge requires proof that the defendant agreed personally to commit two acts of racketeering.

The court of appeals rejected petitioners' argument about the sufficiency of the evidence. The court observed that the acquittals on the substantive counts had no bearing on the sufficiency of the evidence supporting the RICO conspiracy convictions. The court explained that the acquittals could have been the result of mistake or lenity. Pet. App. A30. The court then stated that a defendant's participation in a RICO conspiracy may be established in either of two ways: by showing that the defendant agreed to the overall objective of the conspiracy, or by showing that he personally committed two predicate acts. *Id.* at A30-A31. The court concluded that the evidence was sufficient to support the RICO conspiracy convictions of both petitioners under either theory. *Id.* at A31-A32.

Petitioner Goodhart also contended that the use of a general verdict on the conspiracy count improperly permitted the jury to find him guilty of conspiracy without reaching unanimous agreement on the specific predicate acts that he had agreed to commit or have committed. Goodhart C.A. Br. 9. The court of appeals rejected that contention as well. The court of appeals noted that the trial court had charged the jury that, to find a defendant guilty of conspiracy, the jury was required to reach unanimous agreement on

the specific predicate acts that the defendant had agreed to commit or have committed. Pet. App. A34-A35. Since, the court of appeals noted, a jury is presumed to follow its instructions, it found no abuse of discretion in the district court's refusal to require a special verdict on the conspiracy count. *Ibid.*

**DISCUSSION**

1. Petitioners contend (Pet. 9-19) that the jury should have been instructed that, to find petitioners guilty of RICO conspiracy, it was required to reach unanimous agreement not only on the predicate acts of racketeering that each petitioner agreed to commit or have committed, but also on the specific sub-predicate acts alleged in the substantive RICO count. That contention lacks merit.

a. Section 1962(d) of 18 U.S.C. makes it "unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section." The gist of that offense, as with any conspiracy offense, is the agreement to violate the law—here, one of RICO's substantive provisions. "Conspiracy is an inchoate offense, the essence of which is an agreement to commit an unlawful act." *United States* v. *Shabani*, 513 U.S. 10, 16 (1994) (quoting *Iannelli* v. *United States*, 420 U.S. 770, 777 (1975)). To prove a RICO conspiracy to violate Section 1962(c), the government must show that the defendant *agreed* to conduct or participate in the conduct of an enterprise through a pattern of racketeering activity. The government need not show that any particular acts of racketeering activity occurred. That is because Section 1962(d) "centers on the act of agreement, which makes unnecessary—and in many cases impossible—the identification in the indictment of specific predi-

cate acts that have come to fruition." *United States* v. *Glecier*, 923 F.2d 496, 501 (7th Cir. 1990), cert. denied, 502 U.S. 810 (1991); see *United States* v. *Phillips*, 874 F.2d 123, 128 (3d Cir. 1989) (approving instruction that the jury must find "that each defendant knowingly and willfully agreed to join a conspiracy with knowledge of its goals and knowledge that at least two acts of racketeering of the type described in the indictment (*i.e.*, bribery under state law and extortion under federal law) would be performed by some member[s] of the conspiracy").

Because the RICO conspiracy offense is complete upon the defendant's joining the conspiracy to violate a substantive RICO provision, it is not an element of the offense that the conspirators actually carry out any two particular predicate acts or that they agree that any two particular acts would be committed. And because proof of particular predicate acts is not an element of the offense, no instruction that the jury must be unanimous about such predicates is required. The commission of specific predicate acts (or proof of agreement to commit specific predicate acts) may have evidentiary weight in persuading the jury that the defendant entered into an agreement to violate a substantive provision of RICO. But the jury need not agree unanimously on which items of evidence persuaded each juror that the conspiratorial agreement was reached. As this Court has stated in a related context:

> In these cases, as in litigation generally, "different jurors may be persuaded by different pieces of evidence, even when they agree upon the bottom line. Plainly there is no general requirement that

> the jury reach agreement on the preliminary factual issues which underlie the verdict."

*Schad* v. *Arizona*, 501 U.S. 624, 631-632 (1991) (plurality opinion) (quoting *McKoy* v. *North Carolina*, 494 U.S. 433, 449 (1990) (Blackmun, J., concurring)); accord *Schad*, 501 U.S. at 649 (Scalia, J., concurring in part and concurring in the judgment).

b. Even if the Sixth Amendment required that jurors in a RICO conspiracy case unanimously agree on the specific predicate acts that the conspirators agreed to have committed, that rule would not help petitioners in this case. Petitioners received such an instruction. As petitioners acknowledge (Pet. 15), the district court in this case expressly instructed the jury that it had to reach unanimous agreement as to the racketeering acts attributable to petitioners in order to return a guilty verdict on the conspiracy charge. Pet. App. A34 (quoting unanimity instruction on the RICO conspiracy count). No more is required, even under petitioners' theory.

Petitioners argue that an additional instruction was required in this case to inform the jury that it had to reach unanimous agreement on the particular sub-predicate act constituting each act of racketeering charged in the *substantive* RICO count. That argument rests on the fact that the indictment's substantive RICO count alleged a pattern of racketeering acts, each of which consisted of sub-predicate acts involving different legal theories of how a particular act of bribery or extortion violated state or federal law. Although the indictment's conspiracy count did not incorporate or refer to the substantive count's allegations of predicate acts, petitioners suggest that, under the court's instructions, the jury

would have referred to the definitions of the predicate offenses in the RICO substantive count and then might have reached unanimous agreement on which two predicate offenses to attribute to a defendant without reaching unanimous agreement on the particular sub-predicate act.

It is unlikely that the instructions actually given in this case would have led to such a result. The instructions on the substantive RICO count required the jury to be unanimous not only about the particular predicate act, but also about the particular sub-predicate act that each defendant committed. The instructions stated:

> [A]s to each racketeering act itself, you must unanimously agree as to how, if at all, a Defendant committed the act. This is so because each racketeering act is made up of more than one distinct crime. * * *
>
> [Y]ou cannot find that a Defendant committed a particular racketeering act if some of you think that he committed that act by engaging only in crime A and the rest of you think that he committed that act by engaging only in crime B. There must be one crime within each racketeering act that all of you believe the Defendant committed in order for you to find that the Defendant committed that racketeering act.

67 Tr. 11,973-11,974. Thus, a jury that followed the conspiracy count's cross-reference to the substantive count's definition of predicate acts would have logically concluded that it was required to be unanimous as to particular sub-predicates in order to find the existence of a valid predicate act.

Even if that interpretation of the jury instructions is incorrect, however, petitioners' rights were nonetheless not violated. "It has long been the general rule that when a single crime can be committed in various ways, jurors need not agree upon the mode of commission." *Schad*, 501 U.S. at 649 (Scalia, J., concurring in part and concurring in the judgment). The predicate acts charged in the substantive RICO count grouped various sub-predicate crimes together because each predicate act concerned a particular episode of bribery, extortion, or other crime, and all of the sub-predicate acts were factually related. So long as the jury agreed on the defendants' participation in a particular criminal episode, the jury was not constitutionally required to reach unanimity on the particular "mode of commission." *Ibid.*[*]

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[*] Petitioners cite (Pet. 13-14) several cases in which the courts of appeals have arrived at varying conclusions on the extent to which the Sixth Amendment requires jury unanimity on the facts underlying the elements of certain offenses. None of those cases, however, involved a RICO conspiracy conviction. See *United States* v. *Hall*, 93 F.3d 126 (4th Cir. 1996) (continuing criminal enterprise), cert. denied 117 S. Ct. 1087 (1997); *United States* v. *Edmonds*, 80 F.3d 810 (3d Cir.) (en banc) (same), cert. denied, 117 S. Ct. 295 (1996); *United States* v. *Anderson*, 39 F.3d 331 (1994) (same), reh'g granted in part on other grounds (D.C. Cir.), 59 F.3d 1323, cert. denied, 116 S. Ct. 542 (1996); *United States* v. *Canino*, 949 F.2d 928 (7th Cir. 1991) (same), cert. denied, 504 U.S. 910 (1992); *United States* v. *Hernandez-Escarsega*, 886 F.2d 1560 (9th Cir. 1989) (same), cert. denied, 497 U.S. 1003 (1990); *United States* v. *Echeverri*, 854 F.2d 638 (3d Cir. 1988) (same); *United States* v. *North*, 910 F.2d 843 (D.C. Cir. 1990) (destruction of government property), cert. denied, 500 U.S. 941 (1991); *United States* v. *Duncan*, 850 F.2d 1104 (6th Cir. 1988) (false tax return); *United States* v. *Puerta*, 38 F.3d 34 (1st Cir. 1994) (bank fraud), cert. denied, 115 S. Ct. 1797 (1995); *United States* v.

2. Petitioners contend (Pet. 20-25) that the district court incorrectly instructed the jury that it could find them guilty on the RICO conspiracy count without finding that they agreed personally to commit two predicate acts of racketeering. The district court instructed the jury that, to find petitioners guilty of RICO conspiracy, it was required to find that they agreed *either* to "personally participate in the commission of two predicate offenses," *or* that "other members of the conspiracy would commit two or more predicate offenses." 67 Tr. 11,965. The question whether the RICO conspiracy statute requires proof that the defendant agreed personally to commit two racketeering acts is currently before the Court in *Salinas* v. *United States*, cert. granted, No. 96-738 (Feb. 24, 1997).

In the court of appeals, petitioners did not raise any challenge to the instruction given by the district court. Petitioner Shenberg stated that, "in order to prove the crime of RICO conspiracy, the government was required to prove that each defendant *either* agreed to personally commit 2 RICO acts *or* agreed to have 2 such acts committed by others." Shenberg C.A. Br. 39 (emphasis added). Petitioner Goodhart, in challenging the sufficiency of the evidence to support the conspiracy conviction, argued that the government "failed to prove that [he] agreed to commit *or have committed* at least two racketeering acts."

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*Beros*, 833 F.2d 455 (3d Cir. 1987) (embezzlement); *United States* v. *Holley*, 942 F.2d 916 (5th Cir. 1991) (perjury), cert. denied, 510 U.S. 821 (1993). And, equally importantly, none involved the type of unanimity instruction given in this case. Accordingly, any disagreement reflected in those cases on the proper role of unanimity instructions is not properly presented here.

Goodhart C.A. Br. 15 (emphasis added); see also Goodhart C.A. Reply Br. 20 ("the government must prove that each RICO defendant agreed to either personally commit or have committed by others at least two predicate acts"). The court of appeals reaffirmed its previous ruling that, under the RICO conspiracy statute, "it is 'not necessary that the defendant agree to personally commit two predicate acts,'" Pet. App. A31, and it concluded that the evidence was sufficient to support petitioners' conspiracy convictions because both petitioners had "committed or agreed to have others commit at least two predicate acts," *id.* at A32.

Although petitioners failed to present on appeal a challenge to the district court's jury instruction on RICO conspiracy, the court of appeals passed on the second issue presented in their certiorari petition, which is currently before the Court in *Salinas*. Accordingly, the petition should be held for the decision of the Court in *Salinas*, and then disposed of as appropriate in light of that decision. If the Court holds in *Salinas* that the RICO conspiracy statute requires proof that the defendant agreed to commit personally two predicate acts of racketeering, the court of appeals will be free to consider on remand whether petitioners waived their argument on that point by their failure to present it on their appeal.

## CONCLUSION

As to the first question presented, the petition for a writ of certiorari should be denied. As to the second question presented, the petition for a writ of certiorari should be held for the decision of the Court in *Salinas* v. *United States*, cert. granted, No. 96-738 (Feb. 24, 1997), and then disposed of as appropriate in light of that decision.

Respectfully submitted.

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## REPLY TO BRIEF IN OPPOSITION

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## QUESTIONS PRESENTED FOR REVIEW

### I.

WHETHER THE COURT SHOULD RESOLVE THE SPLIT IN THE CIRCUITS CONCERNING THE DEGREE OF UNANIMITY REQUIRED BY THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT AND THE JURY TRIAL CLAUSE OF THE SIXTH AMENDMENT IN COMPOUND-COMPLEX CRIMES, SUCH AS RICO CONSPIRACY?

### II.

WHETHER THE COURT SHOULD RESOLVE THE SPLIT IN THE CIRCUITS CONCERNING THE FUNDAMENTAL NATURE OF THE "AGREEMENT" PROHIBITED BY RICO CONSPIRACY BY REQUIRING PROOF THAT EACH CONSPIRATOR AGREE TO PERSONALLY COMMIT AT LEAST TWO RACKETEERING ACTS?

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## REASONS FOR GRANTING THE WRIT

### I. THE COURT SHOULD GRANT THE PETITION TO RESOLVE THE CONFLICT AMONG THE CIRCUITS CONCERNING JURY UNANIMITY AND VERDICT SPECIFICITY IN COMPOUND-COMPLEX CRIMES.

Petitioner seeks Supreme Court review, in part, to determine the degree of juror unanamity required in non-common law, complex, "umbrella" crimes, such as RICO conspiracy -- a question left unresolved by this Court in *Schad v. Arizona*, 501 U.S. 624, 650, 111 S.Ct. 2491, 2506 115 L.Ed.2d 555 (1991) (Scalia, J., concurring). In support of his argument for a unanimity requirement, Petitioner relied heavily upon cases interpreting the Continuing Criminal Enterprise statute, 21 U.S.C. § 848, another "umbrella" crime. *See generally United States v. Edmonds*, 52 F.3d 1236 (3d Cir. 1995), *aff'd* 80 F.3d 810 (3d Cir. 1996) (en banc) (error to deny a unanimous verdict instruction as to the predicate crimes which constituted the CCE "series" of violations), *cert. denied*, 1996 U.S. LEXIS 65143 (U.S. 1996).

In its Brief, the United States takes a position that underscores why the Petition should be granted. The United States argues that RICO conspiracy criminalizes an agreement "to violate a substantive RICO provision," it does not require the government to plead or prove that an alleged RICO conspirator "agree[d] that any two particular acts would be committed." Brief of the United States, at p. 9. The position of the United States herein conflicts with the definition of RICO conspiracy adopted in every federal circuit -- including

*both* sides of the split this Court has granted certiorari to resolve in *Salinas v. United States, cert. granted*, No. 96-738 (Feb. 24, 1997). Indeed, it even conflicts with the position the United States took before this Court in its Brief opposing the granting of certiorari in *Salinas*. *See* Brief for the United States In Opposition, *Salinas v. United States*, No. 96-738 (January 1997), at p. 13 ("[a] RICO conspiracy offense therefore occurs if there is an agreement among the conspirators to conduct the affairs of an enterprise through a pattern of racketeering activity, *which includes an agreement that the conspirators, as a group, will commit two or more racketeeering acts*") (emphasis added).

Saying that RICO conspiracy is merely an agreement "to violate a substantive RICO provision" does little to define the nature of the unlawful agreement, because the substantive RICO provision is no ordinary crime. In conspiracy to commit common law crimes, such as robbery, theft, rape or murder, defining the "agreement" is simple; the defendant agrees to rob, steal, rape or murder someone. RICO, however, is not a crime in the ordinary sense; rather, it is a way of committing other crimes -- by conducting an "enterprise" through a "pattern" of "racketeering activity". Therefore, an agreement to violate the substantive RICO provision encompasses two subsidiary agreements -- (1) an agreement to conduct or participate in the affairs of an enterprise and (2) an agreement to the commission of at least two predicate acts. *United States v. Neapolitan*, 791 F.2d 489, 499 (7th Cir.), *cert. denied*, 479 U.S. 939, 107 S.Ct.

422, 93 L.Ed.2d 372 (1986). Both types of agreements must be proved:

> Thus, a defendant who did not agree to the commission of crimes constituting a pattern of racketeering activity is not in violation of section 1962(d), even though he is somehow affiliated with a RICO enterprise, and neither is the defendant who agrees to the commission of two criminal acts but does not consent to the involvement of an enterprise. *If either aspect of the agreement is lacking then there is insufficient evidence that the defendant embraced the objective of the alleged conspiracy.*

*Neapolitan*, 791 F.2d at 499 (emphasis added; footnote omitted). *Accord United States v. Carter*, 721 F.2d 1514, 1528-31 (11th Cir.), *cert. denied*, 469 U.S. 819 (1984). *See also United States v. Bright*, 630 F.2d 804, 834 (5th Cir. 1980) (there "must be proof that the individual, by his words or actions, objectively manifested an agreement to participate, directly or indirectly, in the affairs of an enterprise, *through the commission of two or more predicate crimes*") (emphasis added).

The need for an agreement to commit racketeering acts is particularly important in RICO prosecutions, such as the instant one, where the racketeering "enterprise" is an entirely legitimate entity -- here, the Eleventh Judicial Circuit of Dade County, Florida. An agreement merely to conduct or participate in the affairs of a court system is not illegal. Indeed, it is constitutionally protected under the First Amendment. The only *illegal* aspect of an agreement to violate the substantive

RICO provision involving a legitimate "enterprise" is the agreement to conduct the "enterprise" through the commission of specific criminal acts. The government's contention herein that no such requirement is necessary not only contradicts its position in *Salinas* but would make nonsense of the statute.

Because RICO conspiracy requires the government to prove that each alleged conspirator agreed to the commission of at least two racketeering acts, a defendant charged with RICO conspiracy is entitled to a unanimous verdict as to which two such acts he allegedly agreed to commit where, as here, the indictment relies on multiple predicate acts and "sub" predicate acts. Contrary to the government, requiring unanimity concerning the racketeering acts agreed to is not tantamount to requiring jurors to "reach agreement on the preliminary factual issues which underlie the verdict." Brief of the United States, at pp. 9-10, quoting *Shad*, 501 U.S. at 631-32 (plurality opinion). The racketeering acts are distinct crimes which form the fundamental building blocks of all RICO prosecutions. As this Court recognized in *Shad*, "nothing in our history suggests that the Due Process Clause would permit [the government] to convict anyone under a charge of 'Crime' so generic that any combination of jury findings of embezzlement, reckless driving, murder, burglary, tax evasion, or littering, for example, would suffice for conviction." *Shad*, 501 U.S. at 633, 111 S.Ct. at 2497. RICO, as defined by the government herein, would do just that.

The government also contends that even if the Petitioners are correct about the requirements of RICO conspiracy,

their Petition should be denied because they allegedly received a proper unanimous verdict instruction. Brief of the United States, at pp. 10-11. That simply is not true. While the district court required the jury to unanimously agree on the "racketeering acts," the "racketeering acts" in this case were *not* defined in terms of statutory violations (as required by the definition of "racketeering activity" contained in 18 U.S.C. § 1961(1)).[1] Rather, the "racketeering acts" were simply shorthand labels for the events involved in the alleged criminal conduct. In their Petition, Petitioners pointed to Racketeering Act No. 10 as an example. That "racketeering act" was pleaded merely as the "Act of Racketeering Involving Receipt of $150,000 Payment To Influence the 'Boni Carrillo Case.'" (R1-1-40.) The "generic" combination of crimes from which the jury was ultimately asked to choose was set forth *only* in terms of the "sub" predicate acts. For unanimity principles to have any meaning, the jury had to be unanimous as to which of these "sub" acts each conspirator allegedly agreed to commit.

Finally, the United States contends that it was "unlikely" that the jury would have been misled by the instructions which

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[1] Section 1961(1) defines "racketeering activity," in pertinent part, as either "(A) any act or threat involving murder ... bribery ... which is chargeable under State law" or "(B) any act which is indictable under any of the following provisions of Title 18, United States Code: ... section 1951 (relating to interference with commerce, robbery, or extortion)...."

failed to require unanimity as to the "sub" acts for RICO conspiracy, because the jury *was* required to be unanimous as to the "sub" acts for the *substantive* RICO charge. Brief for the United States, at p. 11. The United States argues that this Court should assume that the jury "cross-reference[d]" to the substantive RICO charge in convicting Petitioners of RICO conspiracy. *Id.*

If the jury utilized the substantive RICO charge in deliberating on the RICO conspiracy count, then why was the unable to reach a verdict on the substantive charge but convicted Petitioners *only* of RICO conspiracy? The United States has no logical explanation for the jury's inconsistent verdict. In any event, this Court must reject the United States' invitation to speculate about the jury's deliberative processes. The Court must assume that the jury strictly followed the instructions as given to them:

> A critial assumption underlying [the] system [of trial by jury] is that juries will follow the instructions given them by the trial judge. Were this not so, it would be pointless for a trial court to instruct a jury, and even more pointless for an appellate court to reverse a criminal conviction because the jury was improperly instructed.

*Parker v. Randoloph*, 442 U.S. 62, 73, 99 S.Ct. 2132, 2139, 60 L.Ed.2d 713 (1979) (plurality opinion). *See also Jackson v. Denno*, 378 U.S. 368, 382 n. 10, 84 S.Ct. 1774, 1783 n. 10, 12 L.Ed.2d 908 (1964); *Opper v. United States*, 348 U.S. 84, 95, 75 S.Ct. 158, 165, 99 L.Ed. 101 (1954).

The jury in this case was not required to be unanimous with respect to the "sub" acts for RICO conspiracy. Since the jury convicted Petitioners *only* of RICO conspiracy, the only logical construction of the verdict suggests that the jury could not reach a verdict on the substantive RICO charge (where it *was* required to be unanimous as to the "sub" acts) but convicted of RICO conspiracy where, due to the absence of the requested instruction, it was allowed to reach a patchwork, non-unanimous verdict.

## II. THE COURT SHOULD GRANT THE PETITION AND CONSOLIDATE IT WITH SALINAS FOR ARGUMENT NEXT TERM

The United States agrees that Petitioners have raised the same issue now pending before the Court in *Salinas v. United States*, *cert. granted*, No. 96-738 (Feb. 24, 1997). However, the United States urges the Court to hold Petitioners' case in abeyance pending the outcome of *Salinas*, rather than consolidating it with *Salinas*. We respectfully submit that consolidation is appropriate under the circumstances.

In *Salinas*, this Court agreed to resolve a split in the Circuits concerning the proper definition of RICO conspiracy -- *i.e.*, whether the conspiratorial "agreement" requires proof that each alleged conspirator agreed to personally engage in a pattern of racketeering, *see, e.g., United States v. Ruggiero*, 726 F.2d 913, 921 (2d Cir.), *cert. denied*, 469 U.S. 831, 105 S.Ct. 118, 83 L.Ed.2d 60 (1984); *United States v. Sanders*, 929 F.2d 1466,

1473 (10th Cir. 1991); *United States v. Winter*, 663 F.2d 1120, 1136 (1st Cir. 1981), *cert. denied*, 460 U.S. 1011, 103 S.Ct. 1249, 75 L.Ed.2d 479 (1983). or whether the government need show that each conspirator agreed only that others would commit the racketeering acts. *See, e.g., United States v. Marmolejo*, 89 F.3d 1185, 1196 (5th Cir. 1996) (collecting cases).

The instant case, however, presents a better case than *Salinas* through which to resolve this conflict. In *Salinas*, Petitioner Salinas was convicted of RICO conspiracy *and* two counts of bribery in violation of 18 U.S.C. § 666(a)(1)(b). *See United States v. Marmolejo*, 89 F.3d 1185, 1188 (5th Cir. 1996). The *Salinas* jury, therefore, had to find that Salinas, in fact, did personally commit two racketeering acts, *i.e.*, the acts corresponding to the bribery counts. *See United States v. Pepe*, 747 F.2d 632, 667-68 (11th Cir. 1984) (where jury convicted defendants of two substantive crimes which were also listed as predicate acts in RICO charge, guilty verdicts on those crimes "operated like special verdicts; by finding guilt on those counts the jury also found that two predicate acts listed in count two had been shown"). Viewing the verdict as a whole, this Court could avoid reaching the merits of the Circuit split due to the bribery convictions.

No such problem is presented in the instant case, because neither Goodhart nor Shenberg was separately convicted of at least two crimes which paralleled the racketeering acts. Goodhart was convicted only of RICO conspiracy; Shenberg was convicted only of RICO conspiracy

and a single act of extortion. Therefore, the Court could not avoid reaching the merits of the Circuit split in the instant case by reference to other counts of conviction.

The United States seeks to avoid consolidation by erroneously arguing that Petitioners failed to raise the *Salinas* issue in the their direct appeal to the Eleventh Circuit. Brief for the United States, at pp. 13-14. Contrary to the United States, Argument Section I of Petitioners' Brief in the Eleventh Circuit raised the *Salinas* issue. In that Section, Petitioners argued that they were entitled to a unanimous jury instruction which, among other things, would have required the jury to unanimously agree "that [each] Defendant *agreed to commit* at least one" of the "sub" racketeering acts. (R18-895-3; emphasis added.) Petitioners attached as Appendix 3 to their Eleventh Circuit brief a copy of this requested instruction; a copy is attached hereto as Appendix 1.[2]

Moreover, as the government acknowledges, the Eleventh Circuit reached the merits of the *Salinas* issue anyway. *Id.* at p. 14. Therefore, this Court could do likewise, even if the

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[2] Prior to requesting this instruction in response to a question from the jury, Petitioners had requested a lengthier instruction which would have required the jury to be unanimous as to whether they believed the Petitioners *either* personally agreed to commit specific crimes *or* whether they merely agreed that these crimes would be committed by others. (R16-726-2.) However, the final instruction requested by Petitioners, and the one at issue in Petitioners' Eleventh Circuit appeal, was the final one discussed in the text.

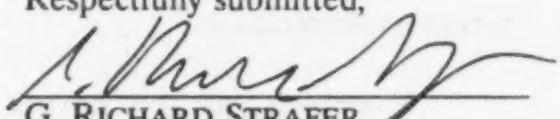
government was correct about the Eleventh Circuit record. *See United States v. Wells*, 117 S.Ct. 921, 925-26 (1997).

Consolidation of the instant case is also appropriate, because the instant case includes the unanimous verdict issue discussed in Section I *supra*. Since that issue is inextricably intertwinced with the merits, this case presents the best case within which to decide these complex but important issues.

## CONCLUSION

For all of the foregoing reasons, as well as those set forth in Petitioners initial Petition, the Petitioners respectfully request that their Petition For a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit be granted.

Respectfully submitted,



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# APPENDIX 1

**PETITIONERS' SECOND REQUESTED JURY INSTRUCTION ON RICO CONSPIRACY (R18-895-3)**

You are further instructed, however, that you must unanimously agree as to which two or more racketeering acts, if any, the Defendant allegedly agreed to commit. It would not be sufficient if some of the jurors should find that the Defendant agreed to commit two of the racketeering acts while the remaining jurors found that he agreed to commit two different racketeering acts; you must all agree upon the same two racketeering acts in order to find the Defendant guilty of Count 1.

Similarly, as to each racketeering act itself, you must unanimously agree as to how, if at all, the Defendant agreed that each act was committed. This is so because each racketeering act is made up of more than one distinct crimes, listed as sub-racketeering acts. It is not necessary that you find that the Defendant agreed to commit all of the crimes listed in the racketeering acts. However, it is necessary that the government prove beyond a reasonable doubt that the Defendant agreed to commit at least one of them. In addition, you must

**unanimously agree as to which crime or crimes listed as sub-racketeering acts the Defendant agreed to commit, if any. That is, you cannot find that the Defendant agreed to commit a particular racketeering act if some of you think that he agreed to commit that act by agreeing to commit only crime (a) and the rest of you think that he is agreed to commit only crime (b). There must be at least one crime within each racketeering act that all of you believe the Defendant agreed to commit in order for you to find that the Defendant agreed to commit that racketeering act.**